Brf. of Snapp for Pl'ff in Err.

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IN THE

Supreme Court of the United States

October Term, A. D. 1899.

168.

FRANK X. WERLING AND
EUGENE SMITH,
Plaintiffs in Error,
vs.
EMIL P. INGERSOLL AND
GEORGE INGERSOLL,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

HOWARD M. SNAPP,
ATTORNEY FOR PLAINTIFFS IN ERROR.

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Supreme Court of the United States

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EUGENE SMITH,
Plaintiffs in Error,
vs.
EMILY E. INGERSOLL AND
GEORGE INGERSOLL,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action of trespass brought in the Circuit Court of LaSalle County, Illinois, by Emily E. Ingersoll and George Ingersoll against Frank X. Werling and Eugene Smith to recover damages for removing certain fences on land claimed by the Ingersolls in section ten (10) township thirty-three (33), north, range three (3), LaSalle County, Illinois.

The east half of the northwest quarter of said section ten was entered by J. M. and W. M. Warnock on *June 26, 1835*, and conveyed by mesne conveyances to John V. A. Hoes on December 27, 1841.

On June 1, 1867, Hoes and wife conveyed to Emily E. Ingersoll all of the west half of the east half of the northwest quarter of said section ten, *lying south of the Illinois and Michigan Canal.*

The west half of the northwest quarter of said section ten was entered by Henry L. Brush *on July 1, 1835.*

Through proper mesne conveyances Emily E. Ingersoll acquired title to all that part of the west half of the northwest quarter of said section ten *lying south of the Illinois and Michigan Canal on June 7th, 1870.* (Record p. 11, sec. 31.)

For more than twenty years prior to November 13, 1897, Emily E. Ingersoll was the owner and in possession of that part of the west half of the southeast quarter of the northwest quarter and all that part of the west half of the northwest quarter of said section ten *lying south of the tow path of the Illinois and Michigan Canal* and during that time maintained a fence along the south line of the towpath, a distance of seventeen feet from the south margin of the canal basin. (Record p. 12, sec. 51.)

Plat A, page 10 of record, shows the location of the Illinois and Michigan Canal and the Ingersoll land.

On November 13, 1897, Werling and Smith, duly constituted agents of the State of Illinois, acting on behalf of the state, and under and by virtue of its authority and direction, removed the fences of the Ingersolls standing within ninety feet of the canal basin and within what is claimed by the State of Illinois to be the ninety-foot reserve of the Illinois and Michigan Canal.

The case was submitted to the Circuit Court of LaSalle County for trial upon a stipulation of certain facts and some

oral proof and judgment for fifty dollars' damages entered against defendants. This judgment was affirmed by the Supreme Court of Illinois in an opinion handed down October 19, 1899. (182 Illinois reports, 25, record p. 52.)

Defendants in error claimed that the right of way of the Illinois and Michigan Canal and the title acquired by the state to land in said section 10, is limited to the land occupied by the canal basin and to a strip seventeen feet wide along the south side of the canal used for a towpath, and that the south margin of the towpath is the northern boundary of their land. The State of Illinois claims that it is the owner of a strip of land ninety feet wide along the south side of the canal basin through section 10.

The issue is therefore limited to a single question, viz: Is the State of Illinois the owner under the acts of congress of March 30, 1822, and March 2, 1827, or either of them, of a strip of land ninety feet in width along the south side of the Illinois and Michigan Canal through said section 10? If the State is owner of this ninety-foot strip, the decision of the Supreme Court of Illinois should be reversed; if the State is not the owner of this ninety-foot strip, the decision should be affirmed.

The congress of the United States, on the 30th day of March, 1822, passed the following act:

"An Act to authorize the State of Illinois to open a canal through the public lands to connect the Illinois river with Lake Michigan.

Be it enacted by the Senate and the House of Representatives of the United States of America, in congress assembled:

Sec. 1. The State of Illinois be and is hereby authorized

to survey and mark, through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; *and ninety feet of the land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in cases hereinafter provided for, and the use thereof forever shall be and the same is hereby vested in the State for the canal, and for no other purpose whatever*—on condition, however, *that if the said State does not survey and direct by law said canal to be opened, and return a complete map thereof to the Treasury Department, within three years from and after the passing of this act*, or if the said canal be not completed, suitable for navigation, within twelve years thereafter, or if said ground shall ever cease to be occupied by, and used for, a canal suitable for navigation, the reservation and grant hereby made shall be void and of none effect; provided always, and it is hereby enacted and declared, that nothing in this act contained, or that shall be done in pursuance thereof, shall be deemed or construed to imply any obligation on the part of the United States to appropriate any money to defray the expenses of surveying or opening said canal; provided also, and it is hereby further enacted and declared, that the said canal when completed, shall be, and forever remain, a public highway for the use of the government of the United States free from any toll or other charge whatever, for any property of the United States, or persons in their service, passing through the same.

Sec. 2. *Every section of land through which said canal route may pass, shall be and the same is hereby reserved from future sale, until hereafter specially directed by law*; and said State is hereby authorized and permitted, without waste, to use any materials on the public lands adjacent to said

canal, that may be necessary for its construction." (Record p. 13.)

Approved March 30, 1822.

On the 14th day of February, 1823, the Illinois legislature passed an act which is in part as follows:

"An act to provide for the improvement of the internal navigation of this state.

Sec. 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that Emanual J. West, Erastus Brown, Theophelus W. Smith, Thomas Sloo, Jr., and Samuel Alexander be, and they are hereby appointed a board of commissioners to consider, devise and adopt such measures as shall or may be requisite to effect the communication, by canal and locks, ***between the navigable waters of the Illinois river and Lake Michigan***; and in the case of the death or resignation of any of the said commissioners, in the recess of the general assembly, the governor, or the person administering the government of this state, shall appoint another commissioner or commissioners to supply such vacancy or vacancies; who shall continue in office until the end of the next session of the general assembly.

Sec. 2. Be it further enacted, That the said commissioners shall choose one of their number to be president of said board, who shall have power to call a meeting of the same, whenever, in his opinion it shall be requisite and necessary, and the said board may adjourn from time to time, to meet at any time and place they may deem most conducive to the public good; and further, the said commissioners ***shall have power to employ an engineer***, and such other persons as may be necessary to enable them to fulfill and discharge the duties imposed upon them by this act; and

to allow them to pay the said engineer and other persons, so by them employed, for their respective services, such sum or sums of money as may be adequate and reasonable.

Sec. 3. Be it further enacted, That it shall be the duty of the said commissioners, as soon as may be, after the passage of this act, to cause that part of the territory of this State, which may lie open or contiguous to the probable courses and ranges of the said canal, to be explored and examined for the purpose of fixing and determining the most proper and eligible route for the same, and to cause all necessary surveys and levels to be taken, and accurate maps, field books and drafts thereof to be made; and further to adopt and recommend proper plans for the construction and formation of the said canal, and of the locks, dams, and embankments, tunnels, culverts, and acqueducts, which may be necessary for the completion of the same, and to cause all necessary plans, drafts and models thereof, to be extended under their direction.

Sec. 4. Be it further enacted, That it shall be the duty of the said commissioners to make, or cause to be made, with as much accuracy and minuteness as may be, calculations and estimates of the sum or sums of money which may or will be necessary for completing the said canal according to the plan or plans which may be adopted and recommended by them for the construction and formation of the same; and to cause the said calculations, and estimates, and all surveys, maps, field books, plans, drafts, and models, authorized and directed by this act, or so many thereof as may be completed, together with a plain and comprehensive report of all their proceedings, under and by virtue of this act, to be presented to the general assembly of the State, at the commencement of their next regular session, or at the commencement of an

extra session of the present general assembly, should the governor convene the same.

Sec. 6. Be it further enacted, That it shall be the duty of the auditor of this State, whenever a majority of the commissioners shall require it, to issue his warrant on the treasurer, to pay to the order of a majority of the said commissioners, out of any money in the treasury not otherwise appropriated, any sum or sums of money in the whole not exceeding six thousand dollars, and for which the said commissioners shall account to the auditor, on or before the 10th day of the next regular session of the general assembly."

Approved February 14, 1823. (Record p. 13.)

During the years 1823 and 1824, the State of Illinois surveyed and marked through the public lands of the United States the route of the canal connecting the Illinois river with the southern bend of Lake Michigan. (Record p. 26, sec. 181.)

The following is a certified copy of a bill rendered by Justus Post, one of the surveyors making that survey and map, with the receipt attached:

The canal commissioners of the State of Illinois, to Justus Post, Dr.

For fifty-four days' services exploring and examining the country between the navigable waters of the Illinois river and Lake Michigan, on the route of the contemplated canal, in the autumn of 1823, at $6 ..... $324.00

Received Dec. 1823, of the canal commissioners, payment in full of the above account.

(Record p. 35.) JUSTUS POST.

The legislature of the State of Illinois on March 4, 1837,

passed an act appropriating $480.00 to be paid to Rene Paul, one of the surveyors who surveyed and marked the route of the canal in 1823 and 1824. The act is as follows:

An act for the relief of Rene Paul and others.

Sec. 1. Be it enacted by the people of the State of Illinois, represented in the general assembly. That the auditor of public accounts is hereby directed to issue his warrant of the treasurer of the State to be paid from the canal fund in favor of Rene Paul, for the sum of four hundred eighty dollars, being the sum of four dollars per day to be paid to him, for the time actually employed in the service of the State, under its authority, as engineer *in surveying and delineating the canal route from Lake Michigan to the Illinois river, in the years 1823 and 1824.*

Sec. 2. There shall be paid to John Waddel the sum of $45, for a boat furnished, and $40 for work and labor done for the canal commissioners in 1823 and 1824; also to Willis Thompson, Elijah Thompson, Andrew Waddel, and J. Watson, the sum of twenty-four dollars each, and to Lewis Bailey the sum of fifty-six dollars for services rendered the said canal commissioners, which shall be in full for all services rendered, to be paid out of the canal funds, as provided in the first section of this act.

Approved 4th March, 1837. (Record p. 286.)

The identity of the surveyors, Justus Post and Rene Paul, and the fact of their employment by the State of Illinois for the purpose of surveying said canal, is further evidenced by the following extract from the Senate Journal for 1836, pages 273, 274, 275, which reads as follows:

Monday, January 23, 1837.

Senate met pursuant to adjournment.

* * * * *

Mr. Thomas from the committee on canal and canal lands, to which was referred the bill for "An act for the relief of Rene Paul and others," reported the following state of facts in relation to the subject matter of the bill: * * *

"Five persons were appointed by name a board of commissioners to consider, devise, and adopt such measures as shall or may be requisite to effect the communication by canal and locks *between the navigable waters of the Illinois river and Lake Michigan*, who were authorized to employ an engineer and such other persons as might be necessary to fulfill and discharge the duties imposed upon them."

"They were also authorized to cause that part of the territory of the State which may lie upon or contiguous to the probable courses and ranges of said canal to be explored and examined for the purpose of fixing and determining the most eligible and proper route for the same; and *to cause all necessary surveys and levels to be taken, and accurate maps filed, and books and drafts thereof to be made.*"

"They were also required to make a report to the next session of the general assembly, or to an extra session, provided the governor should commence the same under the powers here granted."

"The board employed Justus Post and Rene Paul as engineers, who made an experimental survey and estimate of costs, &c."

"Post was paid for his services; Paul was not. And the question is now presented: Shall he be paid? *The fact that he was employed and devoted his time to the service of*

the State, appears from the report of the canal commissioners made to the general assembly in 1825."

"The time of his employment has been proven to be 120 days. The amount claimed is four dollars per day. To the committee the question is plain that the claim ought to be allowed. A want of power on the part of the board of commissioners to employ more than one engineer has been suggested as a reason why the State should not be charged with this claim. It will appear obvious to any one who will examine the subject that this suggestion is founded upon a misconception of the subject. The commissioners were expressly authorized and required to cause examination, surveys and levels to be made of the line of the canal. How could they perform this duty without employing engineers? A grant of power and a requisition to do an act of this kind necessarily included a grant of power to use all the means necessary to the performance of that act. If nothing has been said in any part of the act about the employment of an engineer, the requisition upon the commissioners to cause duties to be done requiring the services of an engineer would have been amply sufficient to justify the employment of such a person; but without relying upon these grounds, the committee are of the opinion that the claim ought to be allowed upon another ground. The two engineers did not act together. One of them commenced operations at Chicago, the other on the rapids of the Illinois. The two were enabled to perform their duties required of them in one-half the time which would have been consumed by one, and thus no possible loss or injury could result to the State by their employment. If but one engineer had been employed, his compensation would have amounted to the same which two would have been entitled to. The only difference therefore, to the

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State between the employment of one or two engineers consists in the fact that the work is done in less time and two persons are paid with the same amount of money which would have been required to pay one. In every respect, therefore, in which the committee can view the subject, the claim ought to be allowed and paid." (Record p. 36.)

On January 10, 1825, the legislature of the State of Illinois adopted a joint resolution directing "That the executive be and he is hereby authorized and required to forward to the president of the United States a copy of the canal commissioners' report, ***with maps thereto annexed***, and also to forward to our members in congress a copy of said report." (Record p. 42.)

A copy of the Post and Paul map, dated 1824, and one of the records in the canal commissioner's office at Lockport, Illinois, for the past sixty years (Mathewson's deposition, record p. 31, and Willard's evidence, p. 44) is here inserted for easy reference. In the copy of this map transmitted with the record of the Supreme Court of Illinois, the date and name of J. Post, one of the makers, proved too faint to reproduce. (See map record p. 44.) To correct this defect plaintiffs in error have filed in this Court a perfect copy of the Post and Paul map, properly certified by the Clerk of the Supreme Court of Illinois.

On January 18, 1826, the legislature of the State of Illinois adopted and afterwards transmitted to the congress of the United States the following memorial:

"United States of America in Congress Assembled:"

"The memorial of the general assembly of the State of Illinois respectfully represents that the construction of a canal ***uniting the waters of Lake Michigan with the Illinois***

river will form an important addition to the great connecting link in the chain of internal navigation which will effectually secure the insoluble union of the conferate members of this great and powerful republic: By the completion of this great and valuable work the connection between the north and the south, the east and the west, would be strengthened by the ties of commercial intercourse and social neighborhood, and the union of the states might bid defiance to internal commotion, sectional jealousy, and foreign invasion. All the states of the Union would then feel the most powerful motives to resist every attempt at dissolution. To effect so great and desirable an object your memorialists believe to be of sufficient importance to engage the attention and awaken the munificent patronage of a government whose principle of action is the promotion of the general welfare. Your memorialists are sensibly alive to the spirit of improvement that manifests itself in almost every section of our extensive country and would fain lend a helping hand in so great and good a cause. Their situation, however, forbids their doing much without the aid of the federal government, into whose treasury almost all funds, whether brought hither by emigrants or earned by the industry of their citizens, are paid for the purchase of the public lands. While this state of things shall continue and the money thus paid into the treasury of the Union is taken out of our State, our people will not be able to engage in the glorious work of improving our common country. Ought the people of this State to stand by with folded arms and behold the great work of internal improvement progress in other States without making an effort to improve their own conditions and at the same time advance the interests of our beloved country? A condition thus paralized is at war not only with our interests,

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but with the best feelings of our hearts. Did this State possess the public domain lying within its bounds as in the case with the older members of this confederacy, your memorialists would not appear before your honorable body to solicit aid in its important work. If, as your memorialists believe, the construction of this canal would be highly beneficial to the Union at large, if the receipts into the treasury of the United States would be augmented by the increased sales of public lands, and if the interest of this State would be also advanced thereby, is it unreasonable to apply to a paternal government for assistance in the promotion of such beneficial ends? It is unnecessary for your memorialists to enlarge on the great advantages of this canal to the Union in the facilities to be afforded in the event of war either with the Indian tribe inhabiting our frontier, or the British nation. Your honorable body is aware that this State is situated on the borders of an Indian country filled with numerous and powerful tribes of the sons of the forest. If our country should be again engaged in war, the saving of expense in the transportation of munitions of war would alone defray the expense of the contemplated canal and justify the United States in making a liberal appropriation for its construction. Your memorialists do not, however, ask your honorable body to appropriate money out of the treasury to aid them in this work. They only ask for a tract of land through which the contemplated canal may pass and which for a series of years will be wholly unproductive to the government unless the canal shall be commenced under auspices favorable to its completion; in which event all the land in the vicinity would immediately become available to the United States. Your memorialists sincerely believe that a liberal appropriation of land for this object would, even in a pecuniary point of

view, be of immense importance to the treasury of the Union. The public lands in the vicinity would not only sell, but at a considerable advance upon the minimum price. Should this opinion be correct (and does not experience justify it?), the United States would be gainers by the proposed donation to the State. Your memorialists further state that at their last session they passed an act of incorporation, upon very liberal terms, authorizing a company to construct the projected canal; but the remoteness of the country from the residence of capitalists has prevented them from engaging in the work. At their present session your memorialists have repealed the charter, and their only hope of soon beginning the work depends upon the liberality of your honorable body. *Your memorialists have caused the route to be explored and estimates to be made of the probable expense of the work*; from which it appears that the cost of constructing the canal will not be less than $600,000, and may possibly amount to $700,000. To the end, therefore, that your memorialists may be enabled to commence and complete this great and useful work, we pray your honorable body to grant to this state the respective townships of land through which the contemplated canal may pass, the avails of which to be appropriated exclusively to the construction of said canal upon such terms and conditions as to your honorable body may seem proper."

DAVID BLACKWELL,
Speaker of the House of Representatives.
RAPHAEL WIDEN,
Speaker of the Senate pro tem.

On March 2, 1827, congress passed the following act to aid the State of Illinois in opening a canal to connect the waters of the Illinois river with those of Lake Michigan:

"An act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect *the waters of the Illinois river with those of Lake Michigan.*

"Be it enacted by the Senate and House of Representatives of the United States of America in congress assembled, That there be, and hereby is, granted to the State of Illinois, for the purpose of aiding the said State in opening a canal to *unite the waters of the Illinois river with those of Lake Michigan*, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the commissioner of land office, under the directions of the president of the United States, from one end of the said canal to the other; and the said lands shall be subject to the disposal of the legislature of the said State for the purpose aforesaid, and no other: Provided, That the said canal when completed, shall be and forever remain, a public highway for the use of the government of the United States, free from any toll, or other charge, whatever, for any property of the United States or persons in their service, passing through the same; *provided, that said canal shall be commenced within five years, and completed in twenty years*, or the State shall be bound to pay to the United States the amount of any lands previously sold, and that the title to purchasers under the State shall be valid.

Sec. 2. And be it further enacted, That, so soon as the route of the said canal shall be located and agreed on by the said State, it shall be the duty of the governor thereof, or such other person or persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular sections

to which the said State shall be entitled, under the provisions of this act, and report the same to the secretary of the treasury of the United States.

Sec. 3. And be it further enacted, That the said State, under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole, or any part of said land, and to give a title in fee-simple therefor, to whomsoever shall purchase the whole, or any part thereof.

Approved March 2, 1827." (Record p. 22.)

On January 22, 1829, the Illinois legislature passed an act, providing for the construction of the Illinois and Michigan Canal, which is, in part, as follows:

"An act to provide for the constructing the Illinois and Michigan Canal.

Sec. 1. Be it enacted by the people of the State of Illinois represented in the general assembly, That the governor shall biennially nominate, and by and with the advice and consent of the senate, appoint three commissioners, whose duty it shall be to consider, devise and adopt such measures as may be required to facilitate and effect the communications, by means of a canal and locks, *between the navigable waters of the Illinois river and Lake Michigan*, and in case of the death, resignation, or refusal to act, during the recess of the legislature, of either of said commissioners, the vacancy thereby occasioned shall be filled by the governor.

Sec. 5. It shall be the duty of the canal commissioners, as soon as practicable after the passage of this act, to cause those parts of the territory of this State which is upon, or contiguous to, the probable course or range of said canal, to

be explored and examined for the purpose of fixing and determining the most proper and eligible route for the same; and to cause all necessary surveys and levels to be taken, and accurate maps, field books, and drafts to be made; and as soon thereafter as they may be able to command sufficient funds, and deem it expedient, shall commence the work by opening a canal, and constructing locks, aqueducts, and dams and embankments, to effect the navigable communication between Lake Michigan and the Illinois river.

Sec. 6. The canal commissioners shall select, or cause to be selected, as soon as practicable, in conjunction with such commissioner as shall be appointed by the commissioner of the general land office, under the direction of the president of the United States, the alternate sections of land granted to this state by the provisions of an act of congress, entitled 'An act to grant a quantity of land to the State of Illinois, for the purpose of aiding her in opening a canal to connect the waters of the Illinois river with those of Lake Michigan,' approved 2nd of March, 1827. And if no commissioner shall be appointed on the part of the general government, the said commissioners, or either of them, shall proceed to make such selections; and shall, without delay, forward to the governor a duplicate of the list containing the numbers of each section by him or them selected, who shall forward a copy of the same to the commissioner of the general land office.

Sec. 10. Said commissioners may sue and be sued, and defend in the name of 'the board of commissioners of the Illinois and Michigan canal'. And to enable said commissioners to accomplish the object herein contemplated, it shall be lawful for them to enter upon and take and use, any lands,

waters, and streams, necessary for the prosecution of the work intended by this act.

Sec. 11. The canal contemplated by this act, shall have the following dimensions, to-wit: At least forty feet in width at the summit water line, twenty-eight feet wide at the bottom, and of sufficient depth to contain at least four feet of water. And it shall be furnished with such locks, aqueducts and dams, as may be required to insure a safe and convenient navigation for boats of at least twenty-five feet long, thirteen feet six inches wide, and drawing three feet of water. The reasonable expenses incurred by said commissioner, in carrying the provisions of this act into effect, shall be paid out of the funds arising from the sales of the aforesaid lands."

"Approved January 22, 1829." (Record p. 23.)

Under the provisions of the last above act the governor of the State of Illinois, by and with the advice and consent of the senate, and on, to-wit, the month of March, 1829, appointed Edward Roberts, Gersham Jayne, and Charles Dunn canal commissioners. (Record p. 26.)

On September 23, 1829, the canal commissioners appointed under the act of the general assembly of January 22, 1829, by their agent and representative, Elijah Iles, obtained from the secretary of state of the State of Illinois the map of the route of the Illinois and Michigan Canal made by J. Post and R. Paul, and at that time said Elijah Iles, for and on behalf of the said commissioners, executed to the said secretary of state the following receipt for said map:

"Vandalia, Sept. 23, 1829."

"Received of the secretary of state, for the use of the commissioners appointed by the general assembly at the ses-

sion of 1828 and 1829 for the purpose of locating and examining the canal route from Lake Michigan to the falls of the Illinois river, the map of the surveyed lands lying on said route *and the profile of the survey made by the former commissioners appointed to locate said route.*"

(Record p. 26.) ELIJAH ILES.

On December 25, 1829, Ninian Edwards, governor of Illinois, transmitted to the commissioner of the general land office, a map of the route of the canal with the selection of lands made by the State. His letter to the land commissioner is as follows:

"Belleville, Illinois, 25 Dec., 1829.

Sir: I have the honor herewith to transmit to you a map of the route which has been selected for *the canal to connect the waters of Lake Michigan and the Illinois river*, with the selections of lands granted to the state which has been made by the canal commissioners of this state, according to law and as nearly agreeable to your instructions as was practicable.

If these selections should be approved by the president, it is hoped that patents will be transmitted as soon as practicable.

Wishing to avoid delay, I have no time to have a copy taken of the map herewith sent and should be very glad if you would send it back after you are done with it.

I have the honor to be,

Very respectfully, sir, y'r mo. ob. s't,"

(Record p. 28.) NINIAN EDWARDS.

At page 28 of record will be found the map referred to. The odd sections colored dark are the sections selected by the State of Illinois. The following is the certificate of the commissioner of general land office:

"Department of the Interior,
General Land Office,
Washington, D. C., November 23, 1832.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed tracing copy of the map of the Illinois and Michigan canal, filed under the provisions of the act of congress approved March 2, 1827, and also, hereto attached, the letter transmitting said map to this office by the governor of Illinois, dated 25 December, 1829, are true and literal exemplifications of the originals now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
(Seal.) Commissioner of General Land Office."
(Record p. 28.)

Section ten (10), township thirty-three (33), north, range three (3), LaSalle County, Illinois, being the section in which the land involved in this suit is located, is one of the sections reserved to the United States under the act of congress of March 27, 1827.

The map transmitted in 1829 to the general land office is known as the Thompson map. On the Thompson map the odd sections selected by the State are colored dark. In all other respects the Thompson and the Post and Paul maps are alike. The route of the canal as indicated upon each of these two maps passes through the same sections and is identical.

The State of Illinois commenced the construction of the Illinois and Michigan Canal upon the route indicated

Assignment of Errors.

First. The supreme court of the State of Illinois erred in affirming the decision of the circuit court of La Salle county, State of Illinois.

Second. The supreme court of the State of Illinois erred in not finding that the State of Illinois acquired title to and is now the owner of the land in dispute under and by virtue of the acts of Congress of the United States of March 30, 1822, and March 27, 1827, reading as follows:

Act of March 30, 1822.

"1. The State of Illinois, be, and is hereby, authorized to survey, and mark, through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; and ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in the cases hereinafter provided for, and the use thereof forever shall be and the same is hereby vested in the said State for a canal, and for no other purpose whatever; on condition, however, that if the said State does not survey and direct by law said canal, to be opened, and return a complete map thereof to the Treasury Department, within three years from and after the passage of this act; or if the said canal be not completed, suitable for navigation, within twelve years thereafter; or if said ground shall ever cease to be occupied by, and used for, a canal suitable for navigation; the reservation and grant hereby made shall be void and of none effect; provided always, and it is hereby enacted and declared, that nothing in this act contained, or that shall be done in pursuance thereof, shall be deemed or construed to imply any obligation on the part of the United States to appropriate any money to defray the expenses of surveying or opening said canal: Provided also, and it is hereby further enacted and declared, that the said canal, when completed, shall be, and forever remain, a public highway for the use of the Government of the United States, free from any toll or other charge whatever, for any property of the United States, or persons in their service, passing through the same.

"2. Every section of land through which said canal route may pass, shall be and the same is hereby reserved from future sale, until hereafter specially directed by law; and said State is hereby authorized and permitted, without waste, to use any materials on the public lands adjacent to said canal, that may be necessary for its construction."

Act of March 2, 1827.

"1. There be, and hereby is, granted to the State of Illinois, for the purpose of aiding the said State in opening a canal to unite the waters of the Illinois river with those of Lake Michigan, a quantity

of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of the said canal to the other; and the said lands shall be subject to the disposal of the legislature of the said State, for the purpose aforesaid and no other; provided, that the said canal, when completed, shall be and forever remain, a public highway for the use of the Government of the United States, free from any toll, or other charge, whatsoever, for any property of the United States, or persons in their service, passing through the same: Provided, that said canal shall be commenced within five years, and completed in twenty years, or the State shall be bound to pay to the United States the amount of any lands previously sold, and that the title to purchasers under the State shall be valid.

"2. So soon as the route of the said canal shall be located and agreed on by the said State, it shall be the duty of the governor thereof, or such other persons as may have been, or shall hereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular sections to which the said State will be entitled, under the provisions of this act, and report the same to the Secretary of the Treasury of the United States.

"3. The said State, under the authority of the legislature thereof, after the selection shall have been so made, shall have power to sell and convey the whole, or any part of the said land, and to give a title in fee-simple therefor, to whomsoever shall purchase the whole or any part thereof."

Third. The supreme court of the State of Illinois misconstrued the intent and effect of the acts of Congress set out in the second assignment of error.

upon the Pôst and Paul and Thompson maps, in 1837, and completed it in 1847. (Record p. 27.)

From the date of its completion the said canal has been suitable for navigation, and has been used as and for a canal for the purposes of navigation. In 1848, A. J. Mathewson, under the direction of the canal commissioners, surveyed and marked the line of the ninety-foot strip on each side of the canal from one end to the other and recorded the maps and profiles of said survey in the office of the canal commissioners. (Record pp. 33, 34.) A copy of the map and survey through section 10 is found at record p. 34.

BRIEF.

I.

The words "and the use thereof forever shall be and the same is hereby vested in the State," employed in the act of March 30, 1822, are words of absolute donation and import an immediate transfer of title, though subsequent proceedings are required to give precision to the title and attach it to specific lands.

St. Joe & Denver Railway vs. Baldwin, 103 U. S., 426.

Grinnell vs. Rock Island Ry., 103 U. S., 742.

Schulenberg vs. Harriman, 21 Wall., 44.

Rutherford vs. Green, 2 Wheat., 196.

Leavenworth vs. U. S., 92 U. S., 741.

Railway Co. vs. Railway Co., 917 U. S., 496.

Van Wyck vs. Knevals, 106 U. S., 360.

Railway vs. Railway, 139 U. S., 1.

U. S. vs. Southern Pacific Ry., 146 U. S., 594.

Wilkinson vs. N. P. Ry., 5 Mont., 538.

Johnson vs. Ballou, 28 Mich., 379.

Swan vs. Larmore, 70 Ala., 561.

B. & M. Ry. vs. Lawson, 58 Iowa, 145.

II.

The act of congress of March 30, 1822, vested in the State *eo instanti* the title to a ninety-foot strip of land on each side of a canal connecting the Illinois river with Lake Michigan, to be thereafter located. Until the canal was located, the title did not attach to any specific ninety-foot strip, but was a float. When the route of the canal was sur-

veyed and determined, the location of the ninety-foot strip became certain, and the title acquired precision and attached to it as of the date of the grant.

H. & St. Jo. Ry. vs. Smith, 9 Wall., 95.
Schulenberg vs. Harriman, 21 Wall., 44.
Leavenworth vs. U. S., 92 U. S., 741.
Railway vs. Railway, 139 U. S., 5.
U. S. vs. Railway Company, 146 U. S., 570.
Rutherford vs. Green, 2 Wheat., 196.
Lessieur vs. Price, 12 Howard, 59.
M., K. & T. Ry. vs. K. P. Ry., 97 U. S., 497.
Buttz vs. N. P. Ry., 119 U. S., 55.
Railway vs. Kerr, 41 Cal., 489.
County vs. Morrison, 28 Minn., 257.
Courtwright vs. Railway Co., 35 Iowa, 386.
Keeley vs. Brickey, 78 Ill., 135.
Railway Co. vs. McDougall, 113 Ill., 607.
Gilbreath vs. Dilday, 152 Ill., 207.
I. C. Ry. vs. Union Co., 94 Ill., 71.

III.

Upon the return of the map to the treasury department of the United States, in the year 1829, the route of the canal became definitely fixed and the State's title attached specifically to the ninety-foot strip on each side thereof.

Butts vs. N. P. Ry., 119 U. S., 55.
K. P. Ry. vs. Dunmeyer, 113 U. S., 629.
Van Wyck vs. Knevals, 106 U. S., 360.
Walden vs. Knevals, 114 U. S., 373.
Railway Co. vs. U. S., 168 U. S., 61.

IV.

The conditions prescribed in the act of 1822, to-wit, that the State should survey and direct by law the canal to be opened and return a complete map thereof to the treasury department within three years, and complete the canal within twelve years, or the grant should be void, were conditions subsequent, the non-performance of which did not divest the State of its title to the ninety-foot strip.

Schulenberg vs. Harriman, 21 Wall., 44.

Grinnell vs. Rock Island Ry., 103 U. S., 739.

Railway Company vs. Mingus, 165 U. S., 431.

Nicholl vs. Erie Railway, 12 New York, 121.

Wheeler vs. City of Chicago, 68 Fed. Rep., 526.

Keeler vs. Brickey, 78 Ill., 135.

Railway vs. McDougall, 113 Ill., 607.

Gilbreath vs. Dilday, 152 Ill., 210.

V.

The conditions prescribed in the act of 1822 being conditions subsequent, the government *only* was concerned in their performance. No individual could take advantage of their non-performance. The government could only re-invest itself with title by judicial proceedings declaring a forfeiture, or by some legislative assertion of ownership.

Schulenberg vs. Harriman, 21 Wall., 44.

Railway vs. McGee, 115 U. S., 473.

Grinnell vs. Rock Island Railway, 103 U. S., 739.

Van Wyck vs. Knevals, 106 U. S., 368.

Nicholl vs. Railway, 12 New York, 121.

Railway vs. Mecklim, 23 Kansas, 167.

Railway vs. Majors, 5 Mont., 111.

Hooper vs. Cummings, 45 Maine, 359.

VI.

The act of March 2, 1827, was passed to aid the State in opening and constructing the canal provided for by the act of March 30, 1822, and to extend the time for completing the same. The act of the general assembly of the State of Illinois of February 14, 1823, and the proceedings taken thereunder; the return of the map of the route of the canal to the treasury department in 1829, and the completion of said canal in 1847, constituted an acceptance by the State of the grant of 1822.

Wheeler vs. Chicago, 68 Fed. Rep., 526.

Railway vs. Barney, 113 U. S., 618.

M., K. & T. Ry. vs. K. P. Ry., 97 U. S., 497.

VII.

Grants of this character should be construed liberally and so as to carry out, as fully as possible, the intention of congress.

M., K. & T. Ry. vs. K. P. Ry., 97 U. S., 497.

Railway vs. Barney, 113 U. S., 625.

U. S. vs. Railway Company, 146 U. S., 598.

Railway Company vs. Forsythe, 159 U. S., 55.

VIII.

When appellees' grantors entered and acquired title to the northwest quarter of said section 10 in 1835, they took the same subject to the right of way of the canal and to the grants previously made by the acts of 1822 and 1827.

St. Joe & Denver Ry. vs. Baldwin, 103 U. S., 426.

Van Wyck vs. Knevals, 106 U. S., 365.

Railway vs. Cook, 163 U. S., 497.

Flint Railway vs. Gorden, 41 Mich., 423.

Rider vs. B. & M. Ry., 14 Neb., 122.

B. & M. Ry. vs. Lawson, 58 Iowa, 148.

Vance vs. Railway Co., 12 Neb., 285.

Bullard vs. Railway Co., 62 Iowa, 382.

Railway vs. Peronto, 3 Dakota, 233.

IX.

Appellees could acquire no right or title to the ninety-foot strip by possession or prescription. The statute of limitations does not run against the State.

Gibson vs. Chouteau, 13 Wallace, 100.

Corlett vs. People, 151 Ill, 23.

X

The ninety-foot strip has been repeatedly referred to in legislative acts, and has been recognized as part of the canal lands of the State.

Laws Illinois 1836, p. 148. (Section 16.)

Laws Illinois 1872, p. 214. (Section 5.)

Statutes Illinois, 1874, p. 190. (Section 8.)

ARGUMENT.

I.

THE ACT OF CONGRESS OF MARCH 30, 1822, AMOUNTED TO AN ABSOLUTE GRANT, IN PRAESENTI, OF A NINETY-FOOT STRIP OF LAND TO THE STATE.

Section 1 of this act contains the following: "and "ninety feet of land on each side of said canal shall be for- "ever reserved from any sale to be made by the United "States, except in cases hereinafter provided for, *and the use thereof forever shall be, and the same is hereby, vested* in "said state for a canal, and for no other purpose whatever— "on condition, however, that if the State does not survey "and direct by law said canal to be opened and return a com- "plete map thereof to the treasury department, * * * "the *reservation* and *grant* hereby made shall be void and of "none effect."

It will be observed that this ninety-foot strip is not only reserved from sale, but that the *use thereof forever* is vested in the State. No broader language could have been employed, evidencing an intent to vest absolute title in the State.

The Supreme Court of the United States has had frequent occasion to construe land grants containing provisions similar to the above, and has held in an unbroken line of decisions, that such a provision imports a grant *in præsenti* and absolute in character.

In the case of Schulenberg vs. Harriman, 21 Wall., 62, the Court say:

"Numerous other decisions might be cited to the same "purport. They establish the conclusion that unless there "are other clauses in a statute, restraining the operation of

"words of present grant, these must be taken in their natural "sense to import an immediate transfer of title, although "subsequent proceedings may be required to give precision "to that title and attach it to specific tracts. * * *. "The rules applicable to private transactions, which regard "grants of future application—of lands to be afterwards des- "ignated—as mere contracts to convey and not as actual "conveyances, are founded upon the common law which re- "quires the possibility of present identification of property "to the validity of its transfer. A legislative grant operates "as a law as well as a transfer of property, and has such force "as the intent of the legislature requires. The case of Rice "vs. Railroad Company, reported in first of Black, does not "conflict with these views. The words of present grant, in "the first section of the act, there under consideration, were "restrained by a provision in a subsequent section declaring "that the title should not vest in the Territory of Minnesota "until the road or portions of it were built."

In the case of Leavenworth vs. Railroad, 92 U. S., 741, the Court, per Justice Davis, say:

" 'There be and is hereby granted' are words of absolute "donation and import a grant *in præsenti*. This Court has "held that they can have no other meaning; and the land de- "partment, on this interpretation of them, has uniformly ad- "ministered every previous similar grant. They vest a pres- "ent title in the State of Kansas, though a survey of the "lands and the location of the road are necessary to give pre- "cision to it and attach it to any particular tract. The grant "then becomes certain and by relation has the same effect "upon the selected parcels as if it had specifically described "them. In other words, the grant was a float until the line "of the road should be definitely fixed."

In the case of St. Joe & Denver Railway vs. Baldwin 103 U. S., 429, the Court, per Justice Field, say:

"The language of the act here and of nearly all the con-
"gressional acts granting lands is in terms of a grant *in præ-*
"*senti*. The act is a present grant, except so far as its immedi-
"ate operation is affected by the limitations mentioned.
" 'There is hereby granted' are the words used, and they im-
"port an immediate transfer of interest, so that when the
"route is definitely fixed the title attaches, from the date of
"the act, to the sections, except such as are taken from its
"operation by the clauses mentioned. This is the construc-
"tion given by this Court to similar language in other acts of
"Congress."

Under these decisions there can be no question, but, that under the act of Congress of March 30, A. D. 1822, the State of Illinois became vested with the title and the right to the perpetual use for the canal, to a strip of land ninety feet wide on each side of a canal, the route of which should be marked and surveyed by said State through the public lands of the United States, connecting the Illinois river with the southern bend of Lake Michigan.

II.

UNTIL THE CANAL ROUTE WAS DETERMINED THE TITLE WAS A FLOAT. UPON ITS DETERMINATION, THE LOCATION OF THE NINETY-FOOT STRIP BECAME CERTAIN AND THE TITLE OF THE STATE ACQUIRED PRECISION AND ATTACHED TO IT AS OF THE DATE OF THE GRANT.

If anything in the land laws of the United States can be considered as thoroughly settled it is this proposition.

In the case of St. Joe Railway vs. Smith, 9 Wall., 99, the Court, per Justice Miller, in construing the swamp land grant, say:

"Now here is a present grant by Congress of certain "lands to the State within which they lie, but it is by a de- "scription which requires something more than a mere refer- "ence to their townships, ranges, and sections to identify "them as coming within it. In this respect it is precisely like "the railroad grants which only become certain by the loca- "tion of the road. In fact, in this regard the swamp land "grant was the more specific, for all the lands of that descrip- "tion were granted and they have remained so granted ever "since, while no particular land was described in the railroad "grant which was a float, to be determined by the choice of "the line of the road in future. No act of Congress has ever "attempted to take back this grant of the swamp lands or to "forfeit it or to give it to any other grantee, or modify the "description by which they were given to the States."

In the case of Schulenberg vs. Harriman, 21 Wall., 60, the Court say:

"It is true that the route of the railroad, for the con- "struction of which the grant was made, was yet to be desig-

"nated, and until such designation the title did not attach to "any specific tracts of land. The title passed to the sections, "to be afterwards located; when the route was fixed their lo- "cation became certain, and the title, which was previously "imperfect, acquired precision and became attached to the "land."

In the case of St. Paul Railway vs. N. P. Railway, 139 U. S., 5, the Court, per Justice Field, say:

"The route not being at the time determined, the grant " was in the nature of a float, and the title did not attach to "any specific sections until they were capable of identification; "but when once identified, the title attached to them as of "the date of the grant, except as to such sections as were "specifically reserved. It is in this sense that the grant is "termed one *in præsenti* that is to say, it is of that charac- "ter as to all lands within the terms of the grant and not re- "served from it at the time of the definite location of the "route. This is the construction given to similar grants by "this Court, where the question has been often considered. "Indeed, it is so well settled as to be no longer open to dis- "cussion."

From these decisions it would seem clear that upon the passage of the Act of Congress of March 30, 1822, the State of Illinois became thereby immediately vested with the title to ninety feet in width of land lying on each side of a canal to be by the State marked, surveyed and afterwards constructed through the public lands of the United States, connecting the Illinois river with Lake Michigan, but that such title did not attach to any particular lands until the route of said canal was afterwards surveyed and located, under the provisions of said act, and until said canal was afterwards con-

structed by the State, under the provisions of the acts of March 30, 1822, and March 2, 1827; and upon the completion of said canal the title of the State to the land so granted by the act of March 30, 1822, acquired precision and became attached to the ninety feet in width on each side of said canal as constructed.

III.

THE CONDITIONS ANNEXED TO THE GRANT OF 1822, THAT A MAP OF THE ROUTE BE RETURNED WITHIN THREE YEARS, AND THE CANAL COMPLETED WITHIN TWELVE YEARS, WERE CONDITIONS SUBSEQUENT, THE NON-PERFORMANCE OF WHICH DID NOT DIVEST THE STATE OF ITS TITLE.

The conditions prescribed in the act of 1822, as to the survey of the route, the return of the map, and the completion of the canal, are similar in effect to those contained in the *swamp land* and *railroad grants* made by the United States.

In some of these acts the words *hereby granted* are followed by a provision requiring certain acts, such as a survey and completion of the work, to be performed within a specified time; in others, the words *hereby granted* are followed by a provision that unless such acts be performed within a specified time, the grant shall be void; and in others, the language employed is, *are hereby granted on condition that certain acts* (such as a survey of the route and a completion of the work) *be performed within a specified time.*

In construing these various acts this Court has invariably held that the conditions annexed are conditions subsequent.

The act of Congress of June 3, 1856, granted certain lands to the State of Wisconsin, to aid in the construction of railroads. Section 4 of the act provided *that if the road was not completed within ten years, the lands unsold should revert to the United States.*

In the case of Schulenberg vs. Harriman, 21 Wall., 62, the Court, per Justice Field, in construing this act, say:

"The provision in the act of Congress of 1856, that all "lands remaining unsold after ten years shall revert to the "United States, if the road be not then completed, is no "more than a provision that the grant shall be void if a con- "dition subsequent be not performed. * * * The prohi- "bition against further sales, if the road be not completed "within the period prescribed, adds nothing to the force of "the provision. A cessation of sales in that event is implied "in the condition that the lands shall then revert; if the con- "dition be not enforced, the power to sell continues as before "its breach, limited only by the objects of the grants, and the "manner of sale prescribed in the act."

In the case of Railway & Iron Co. vs. Cunningham, 155 U. S., 372, the Court, per Justice Brewer, say:

"Although there was a provision for the forfeiture of "the land, if the road was not completed within ten years, "such provision was a condition subsequent, which could be "enforced only by the original grantor, the United States, "and until in some appropriate method it asserted is right of "forfeiture, the title remained in the State of Michigan or "the corporations upon which, from time to time, it con- "ferred the benefit of the grant. (Citing authorities)."

In the case of United States vs. Railway, 146 U. S., 594, the Court, per Justice Brewer, after citing with approval the opinion of Justice Field in the case of Railway vs. Railway, 139 U. S., 1, say:

"In view of this late and clear declaration, it would be a "waste of time to attempt a re-examination of the questions "or a re-statement of the reasons which have established "these as the settled rules of law in respect to land grants, "and made it so that the old common law rule as to the

"necessity of identification to a conveyance, has not been con-
"trolling in determining the scope and effect of a congres-
"sional land grant. * * * It may not be amiss to notice
"the case of Schulenberg vs. Harriman, 21 Wall., 44. In that
"case land had been granted to the State of Wisconsin to
"aid in the construction of a railroad. The language of the
"grant was like that in this: 'There be and is hereby granted.'
"A further provision was that if the road be not completed
"within ten years 'no further sales shall be made, and the
" 'lands unsold shall revert to the United States.' The rail-
"road was not completed within the time specified. There-
"after timber was cut and removed from these lands, and the
"question for consideration was as to the ownership of that
"timber. It was held that the timber was the property of
"the State; that by the grant title to the land passed to the
"State upon the location of the road, and that though the
"road was not completed within the time specified, and
"though there was the provision that the unsold lands should
"revert, yet the title still remained in the State, held under a
"condition subsequent, and held until the government should
"take some steps to assert a forfeiture."

In the case of Railway vs. Mingus, 165 U. S., 430, the Court, per Justice Brown, say:

"There is no doubt that where an estate is granted sub-
"ject to a condition subsequent, the mere fact that there has
"been a breach of such condition, will not re-vest the title in
"the grantor without some act or declaration upon his part.
"Ruck vs. Rock Island, 97 U. S., 693, 696. In this case it
"was held, by Mr. Justice Swayne, that it was not denied by
"the plaintiff that the title had passed and that the estate had
"vested by the dedication if the conditions subsequent were

"broken; that did not *ipso facto* produce a reverter of the "title. The estate continued in full force until the proper "step was taken to consummate the forfeiture."

All the decisions of the Supreme Court of Illinois since the Keeler case (78 Ill., 135,) are in harmony with and are based upon the doctrine above announced.

The swamp land act of September 28, 1850, granted to the State of Arkansas, and other states, all overflowed lands within their limits, after the passage of the act. Section 2 required the Secretary of the Interior, as soon as practicable, after the passage of the act, to make out an accurate list and plats of the swamp lands, and transmit the same to the governors of the states and at the request of said governors to cause patents to be issued to the states therefor, and provided that "on that patent the fee simple to said "lands shall vest in said State * * * subject to the dis- "posal of the Legislature thereof."

In the case of Thompson vs. Prince, 67 Ill., 283, the Court, per Justice Scott, in construing this act, say:

"It does not seem to us to be the true construction of "the swamp land act of 1850, that of itself, it grants the fee "of all swamp and overflowed lands to the several states in "which they are situated, without some act of segregation. "Manifestly, if anything remains to be done by the grantor "or grantee to consummate the grant after the passage of "the law, it will not take effect and vest the title until such "act has been performed."

On page 284 the Court say: "The comprehensive words "of the first section are obviously limited by that which is "contained in the subsequent sections. The language em- "ployed indicates unmistakably that it was the intention of

"Congress that the lists should be made and the patents is-
"sued, before the fee in the lands should be vested in the sev-
"eral states. It is difficult to understand how any other con-
"struction can be given to the second section."

On page 285 the Court say: "The grant could not be-
"come definite and certain until the lists and the plats should
"be furnished according to the provisions of the act * *
"*. Neither the State nor the County of Adams, in which
"it is situated, ever claimed any interest in the land. Hav-
"ing never been separated from the other public lands by
"any act of the government or its officers, we are of opinion
"the fee did not pass to the State merely by the passage of
"the swamp land act of 1850, if it was in fact swamp land
"and we have no doubt it was, the State, if it desired
"to avail of the benefits of the grant, ought to have taken
"steps, before the government conveyed it, to have the title
"confirmed and the patent issued. Having failed to do so,
"appellee could lawfully enter it, and his title is paramount
"and must prevail."

In the case of Chicago vs. McGraw, 75 Ill., 573, the Court, per Justice Schofield, in construing the act of Congress of March 30, 1822, (which, as we shall hereafter demonstrate, was not involved in the case) after referring to the conditions in the act, as to the survey and return of the map, say:

"There is no evidence whatever, in the record before us,
"that these conditions were complied with by the State, and
"it is incumbent upon the defendant, in order to avail of the
"reservation and grant, as against the possession of the plain-
"tiff, to show that the conditions were complied with, be-

"cause this is made indispensable by the act of Congress to "the vesting of the rights conferred in the State."

This doctrine was in harmony with, and doubtless based upon the opinion in the Thompson case, *supra*, which has since been overruled.

In the case of Keller vs. Brickey, 78 Ill., 133, the swamp land grant of September 28, 1850, was before that Court a second time and its previous decision was overruled. The Court, per Justice Breese, on page 135, say:

"The tract in question being of the description embraced "in the act of Congress of September 28, 1850, it became at "that date the absolute property of the State, subject to its "control and in which the government of the United States "thence forward, had no interest and could not sell it to an- "other. That this is the doctrine, is clearly established by "the case of the Railroad Company vs. Smith, 9 Wall., 96, "where the subject is fully discussed. That these lands so "granted to the states were by various acts of the Legisla- "ture vested in the counties in which they are situated, ap- "pears by the acts cited, and by the last act passed upon the "subject, approved February 14, 1859. Whatever this Court "may have decided in respect to the condition of the title to "these lands the Supreme Court of the United States, whose "prerogative it is to construe acts of Congress, must be "regarded as authorative on this question. That Court hav- "ing decided that by the terms of the act of September 28, "1850, the title to these lands vested *ipso facto* in the State, "the State, having competent authority passed the title to "the counties."

The doctrine announced in the above case has since been reaffirmed by the Supreme Court of Illinois.

In the case of Gilbreath vs. Dilday, 152 Ill., 210, the Court, per Justice Philips, in construing the swamp land grant, say:

"That this was swamp and overflowed land at the time "it was sold to McCullough, the proof is conclusive. Appel- "lant and all the witnesses say that this has always been "swamp land—the bottom of a pond—and worthless till "drained. The county sold this land and attempted to con- "vey it as swamp land. In Railroad Co. vs. Smith, 9 Wall., "95, the Supreme Court of the United States held, that un- "der the act of Congress, the title to swamp and overflowed "lands became *ipso facto* vested in the State, and that it "could not be deprived thereof because the Secretary of the "Interior had neglected his duty and failed to furnish the "State with the evidence, as he was directed to do by the act "as to what lands came within the description of 'swamp and "'overflowed lands' but that such fact could be proved by "any witnesses whose personal knowledge would enable them "to testify as to the character and condition of the tracts. In "Keller vs. Brickey, 78 Ill., 133, it was held that the act of "Congress of September 28, 1850, vested the title to "these lands in the State without any further act being done, "and that the State, having competent authority, passed the "title to the counties by act of the Legislature.

"In Wabash, St. Louis & Pacific Railway Co. vs. Mc- "Dougall, *et al*, 113 Ill., 603, it was held to be established "that the county would be absolutely invested with the title "to the land whether the certificate of the Auditor, which is "made evidence of the fact by the act of the Legislature of "1854, was granted or not, and that without the Auditor's "certificate, parol evidence would be competent to prove "the character and condition of the land."

The doctrine announced by Justice Schofield in the McGraw case upon which the decision of this case was predicated, in effect is, that the conditions annexed to the grant of 1822 were conditions precedent, the performance of which was indispensable to vest title in the State.

This doctrine, as we have shown, has been overruled by the Supreme Court of Illinois in subsequent decisions. No authority can be found to support it, either in the text books or the decisions of the Federal or State Courts.

The conditions annexed to the grant of 1822, providing that the State should direct by law the canal to be opened and return a complete map thereof to the Treasury Department within three years and complete the canal within twelve years, were conditions subsequent, and the non-performance of these conditions did not divest the State of its title to the ninety-foot strip.

IV.

THE CONDITIONS ANNEXED, BEING CONDITIONS SUBSEQUENT, NO INDIVIDUAL CAN COMPLAIN OF THEIR NON-PERFORMANCE, AND THE GOVERNMENT COULD ONLY RE INVEST ITSELF WITH TITLE BY JUDICIAL PROCEEDINGS DECLARING A FORFEITURE, OR BY LEGISLATIVE ASSERTION OF OWNERSHIP.

In the case of Schulenberg vs. Harriman, 21 Wall., 63, the Court say:

"It is settled law that no one can take advantage of the "non-performance of a condition subsequent annexed to an "estate in fee, but the grantor or his heirs or the successors "of the grantor, if the grant proceed from an artificial per- "son; if they do not see fit to assert their right to enforce a "forfeiture on that ground the title remains unimpaired in "the grantee. The authorities on this point, with hardly an "exception, are all one way from the Year Books down. And "the same doctrine obtains where the grant upon condition "proceeds from the government; no individual can assail the "title it has conveyed, on the ground that the grantee has "failed to perform the conditions annexed * * *. In the "present case no action has been taken, either by legislation "or judicial proceedings to enforce the forfeiture of the "estate granted by the acts of 1856 and 1864. The title re- "mains, therefore, in the State as completely as it existed on "the day when the title, by location of the route of the rail- "road, acquired precision and became attached to the ad- "joining alternate sections."

In the case of Grinnell vs. Railway, 103 U. S., where it was sought to defeat the title of the railway to lands granted by the act of 1856, upon the ground that the road as con-

structed under the act of 1864, varied from the route surveyed and reported to the land office, the Court, per Justice Miller, on page 744, say:

"Another point equally fatal to the plaintiffs in error is, "that the assertion of a right by the United States to the "land in controversy, was wholly a matter between the gov- "ernment and the railroad company or its grantors. The "legal title remains where it was placed before the act of "1864. If the government desires to be re-invested with it, "it must be done by some judicial proceeding or by some act "of the government asserting its right. It does not lie in "the mouth of everyone who chooses to settle on these lands "to set up a title which the government itself can only assert "by some direct proceeding. These plaintiffs had no right "to stir up a litigation which the parties interested did not "desire to be started. It might be otherwise if the legal title "was in the government. Then the land would be subject to "homestead or pre-emption rights. But the title is not in "the government."

In the case of Van Wyck vs. Knevals, 106 U. S., 368, the Court, per Justice Field, say:

"The defendant having failed to establish the validity of "his own title, attacks the right of the company to the lands "covered by the grant, alleging that the company never "completed the construction of the entire road for which the "grant was made; that after filing this map with the secre- "tary of the interior it changed, for a part of the distance, "the route of the road, and that it never complied with the "conditions for the extension of its road within the limits of "Nebraska. * * * If the whole of the proposed road has "not been completed any forfeiture consequent thereon

"could be asserted only by the grantor, the United States, "through judicial proceedings or through the action of Con- "gress. A third party cannot take upon himself to enforce "conditions attached to the grant when the government it- "self does not complain of their breach. The holder of an "invalid title does not strengthen his position by showing "how badly the government has been treated with respect to "the property. As to the alleged deviation of the road con- "structed from the route laid down in the map, admitting "such to be the fact, the defendant is in no position to com- "plain of it; the lands in controversy are within the required "limit, whether that be measured by one line or the other."

In the case of Railway vs. McGee, 115 U. S., 463, the Court, per Chief Justice Waite, say:

"It has often been decided that lands granted by Con- "gress, to aid in the construction of railroads, do not revert, "after condition broken, until a forfeiture has been asserted "by the United States, either through judicial proceedings "instituted under authority of law for that purpose, or "through some legislative action legally equivalent to a "judgment of office found at common law. Legislation to be "sufficient must manifest an intention by Congress to re-assert "title and to resume possession. As it is to take the place of "a suit by the United States to enforce a forfeiture, and a "judgment therein establishing the right it should be direct, "positive and free from all doubt or ambiguity."

In the case of Railway vs. Mingus, 165 U. S., 430, the Court, per Justice Brown, say:

"The estate continued in full force until the proper step "was taken to consummate the forfeiture. This act can only "be done by the grantor during his lifetime and after his

"death by those in privity of blood with him. * * * But "where the grant is a public one, this Court has held, in a "series of cases, that the remedy of the government is by an "inquest of office or office found, a legislative proceeding "but little used in this country, or by a legislative act, di- "recting the possession and appropriation of the land."

It is not claimed or pretended that the United States has ever taken any action, by judicial proceedings, legislative assertion or otherwise, to enforce a forfeiture because of the non-performance of the conditions prescribed in the act of 1822.

These decisions settle this proposition: That the State of Illinois, being invested with title to ninety feet on each side of said canal, could not be divested of title by the non-performance of said conditions, but could only be divested of such title by the United States, by affirmative action on its part, viz: either by judicial proceedings to enforce a forfeiture or by legislation.

V.

THE ACT OF MARCH 2, 1827, WAS PASSED TO AID THE STATE IN CONSTRUCTING THE CANAL CONTEMPLATED BY THE ACT OF 1822, AND TO EXTEND THE TIME FOR COMPLETING THE SAME, AND A COMPLIANCE WITH ITS CONDITIONS CONSTITUTED AN ACCEPTANCE OF THE GRANT OF 1822.

We concede that the opinion rendered by Justice Schofield in the McGraw case (75 Ill., 566) is squarely against this proposition. We insist, however, that a construction of the acts of 1822 and 1827 was not necessary to a decision of that case, and that the part of the opinion relative to the ninety-foot strip is mere *dicta*.

In the McGraw case (as shown by the record on file in the Supreme Court of Illinois) the facts were as follows.

The plaintiff, Mary McGraw, claimed title to and was in possession of lots 5, 6 and 7 in block 88, in Canalport, and also of fractional lot 1 in the same block, across the canal. The premises were enclosed by fences, and buildings were situated thereon, some of which were erected in 1849.

In the year 1872 the city undertook to cleanse the Chicago river by deepening the bed of the canal, and through its board of public works employed contractors for that purpose. On August 19 Everett, the foreman of the contractors, went upon the plaintiff's premises and tore down the barn, removed the fences, destroyed the garden, and excavated up to the very foundations of the plaintiff's dwelling.

The plaintiff instituted an action of trespass against the City of Chicago, the board of public works, the contractors, and their foreman. The case was tried by a jury and resulted

in a judgment against the city, from which judgment an appeal was taken to this Court.

The brief filed by appellant's attorney (Judge T. Lyle Dickey) consists of thirty pages. The main points urged and relied on by Judge Dickey for a reversal of the judgment were: *First*, That the husband of the plaintiff should have been the plaintiff; *second*, that the city was no party to the trespass; *third*, the admission of incompetent testimony; and, *fourth*, that the Court erred in giving certain instructions for appellee pertaining to *color of title*, and in refusing certain of appellant's instructions pertaining to the relations of husband and wife.

To the discussion of these questions, twenty-eight and one-half pages of the brief is devoted.

On the last half of page 29 of the brief, Judge Dickey insists that the *ninety-foot* strip was dedicated by the United States, before the lands in controversy were put in market for sale, to the use of the State for canal purposes. That it was accepted by the State and under the proof was taken possession of, by the location of a towpath upon the premises in question, and that the parties engaged in widening the canal on behalf of the State were justified in taking the ground for that purpose. In support of his contention he then cites various acts of Congress and laws of Illinois.

Counsel for appellees in their brief insisted that the canal, as originally surveyed, did not touch or go upon any portion of the plaintiff's premises.

Judge Dickey, in his reply brief, still insisted that the *locus in quo* was within the nine-foot strip. Subsequent, however, to the filing of his reply brief, Judge Dickey ad-

dressed the following letter to the Court, which is now among the files in the case:

"To the Judges of the Supreme Court of Illinois:

"In the case of the City of Chicago vs. McGraw—at the "first of my reply heretofore presented—I suggested that "the McGraw lot was within the ninety feet staked out in "1836. The counsel for appellee have drawn my attention "to parts of the maps which convince me that this was an "error and that in fact the McGraw house and barn were "within the ninety feet as staked out in 1845, and ***not on the "canal line as located in 1836.*** T. LYLE DICKEY,

"Counsel to the corporation
of the City of Chicago."

The town of Canalport was laid out in 1836. The canal, as originally surveyed and laid out in the year 1836, did not touch the McGraw lots, and no portion thereof was embraced within the ninety-foot strip. A change was made in the route of the canal, through Canalport, in the year 1845. ***This was some ten years after section 30, which embraced the McGraw lots, had been purchased by Hamilton, the plaintiff's grantor, from the United States.***

The ninety-foot strip, therefore, was neither directly nor indirectly involved in the McGraw case.

But if it be conceded that this question was properly before the Court, we insist that the facts essential to its determination were not presented, and that the decision, under the evidence in this case, and the decisions of this Court is clearly wrong; ***moreover the State of Illinois was not a party to that suit, and therefore could not be bound by the decision.***

The record in this case contains maps, surveys, reports,

proceedings of the commissioners, memorials, acts of the legislature and historical facts, which, taken together, demonstrate beyond all question that these two acts of Congress refer to the same and must be construed together—none of which were offered in evidence or even referred to in the McGraw case. The only evidence offered in the McGraw case bearing upon the question of the ninety-foot strip, consisted of three acts of Congress and a number of the statutes of Illinois.

The reasons assigned by Justice Schofield, in support of the conclusion, that these two acts constitute separate and distinct offers, viewed in the light of the record in this case are without force.

The opinion of Justice Schofield concludes as follows:

"The act of Congress of March 2, 1827, does not pur-"port to be an amendment of the act of March 30, 1822, nor "does it, even by inference, refer to it. In our opinion, these "acts constitute distinct and independent offers by the gov-"ernment of the United States of aid to the State in the con-"struction of canals, and the latter one having been accepted "without reference to the terms and conditions of the for-"mer, the State is only entitled to the grant which it con-"veys."

The reasons urged in support of this conclusion, in substance are: First, *That the act of 1822 provides for a canal connecting the Illinois river with the southern bend of Lake Michigan, whereas the act of 1827 provides for a canal connecting the Illinois river with the waters of Lake Michigan, and that these two acts contemplate different canals;* second, *that it does not appear that the canal as constructed is upon the route contemplated by the act of 1822;* and third, *that the*

memorial of 1826 evidenced an intent upon the part of the State to abandon the grant of 1822, and to apply to Congress for aid to construct another and different canal.

The title of the act of Congress of March 30, 1822, is as follows: "An act to authorize the State of Illinois to open "a canal through the public lands to connect the Illinois "river with Lake Michigan." (Record p. 13.)

Section 1 of the act begins as follows: "The State of "Illinois be and is hereby authorized to survey and mark "through the public lands of the United States the route of "the canal connecting the Illinois river with the southern "bend of Lake Michigan." (Record p. 13.)

The title of the act of March 2, 1827, is as follows: "An "act to grant a quantity of land to the State of Illinois, for "the purpose of aiding in opening a canal to connect the "waters of the Illinois river with those of Lake Michigan."

Section 1 of this act begins as follows: "Be it enacted " * * * that there be and is hereby granted to the State "of Illinois, for the purpose of aiding the said State in open- "ing a canal to unite the waters of the Illinois river with "those of Lake Michigan, a quantity of land * * " (Record p. 22.)

Justice Schofield construes the words ***southern bend of Lake Michigan*** as used in section 1 of the act of 1822, to mean the extreme southern curve or point of the lake, and holds that a "canal to unite the waters of the Illinois river "with those of Lake Michigan," as contemplated by the act of 1827, has not for one of its termini the ***southern bend of Lake Michigan.***

This construction, we insist, is technical and strained.

Moreover, it imputes an absurd act to the congress of the United States.

An examination of any map or geography will demonstrate that if a canal were to be constructed, connecting the Illinois river at any point with the extreme southern curve of Lake Michigan, that such canal would extend through the territory of the State of Indiana for a distance of at least twenty miles, and that the eastern terminus thereof would be in the State of Indiana.

Can it seriously be contended that the government, by the act of 1822, intended to vest in the State of Illinois a part of the territory of Indiana?

In 1822 the country was new and undeveloped. There was no reason for making the extreme southern curve of the lake an objective point or designating it as one of the termini of the canal.

The act of 1822 contemplated a canal within the State of Illinois, connecting Lake Michigan with the navigable waters of the Illinois river, to be constructed through the public lands upon the most practical route. The line was to be determined by actual survey at a future period. The engineering problems and economic questions involved in the fixing of the route, concerned the State of Illinois rather than the United States. The government could not know whether the extreme southern curve of the lake, from an engineering standpoint, would constitute a practical and feasible terminus or not. To fix the extreme southern curve of the lake, or any other specific point, as one of the termini of the canal, might defeat the very object and purpose of the act. From the very nature of things, Congress must have

intended to give the State a reasonable latitude with regard to the precise point of the terminus.

The entire shore of Lake Michigan, within the jurisdiction of the State of Illinois, constitutes the southern bend of the lake, if the words be used in their broad and liberal sense, and it was in this sense that the words were employed in the act of 1822.

If Justice Schofield's construction be the correct one, then the title of the act of 1822 contemplates one canal and section 1 of the same act contemplates another and different canal.

That the State of Illinois, and every one else, understood the words *southern bend of Lake Michigan* in their broad and liberal sense, and that as used in the act of 1822 they had reference to a canal connecting the waters of Lake Michigan with the Illinois river, is demonstrated by all subsequent proceedings and legislation pertaining to the canal.

The act of the general assembly of February 14, 1823, directing the canal to be surveyed and opened, as required by the act of 1822, refers to the canal as one *requisite to effect communication between the navigable waters of the Illinois river and Lake Michigan.* (Record p. 13.)

The governor's message of November 16, 1824, refers to the canal as a canal *between Lake Michigan and the Illinois river.* (Record p. 39.)

The memorial of November 20, 1824, is for a grant of land on each side of *the canal proposed to be opened between Lake Michigan and the Illinois river.* (Record p. 40.)

The appropriation act of the general assembly of January 13, 1825, refers to the canal as *the canal between the waters of Lake Michigan and the Illinois river.* (Record p. 15.)

The act of January 17, 1825, incorporating the Illinois and Michigan Canal Company, begins as follows: "Where-"as, the improvement of the internal navigation of the State, "by connecting the waters of the Illinois river and Lake "Michigan, will greatly promote, etc." (Record p. 15.)

In the case of Wheeler vs. City of Chicago, tried in the Circuit Court of the United States (Northern District) in 1895, Judge Allen, in commenting upon the opinion of Justice Schofield in the McGraw case, said:

"It occurs to me that there is no substantial conflict, "geographically or practically, between a terminus described "as the southern bend of Lake Michigan and one described "as the waters of Lake Michigan. The latter term is broad-"er geographically, at least in its literal form, than the south-"ern bend of Lake Michigan; but can the line strike any "point on the shore of Lake Michigan, within the limits of "Illinois, which is not a point somewhere in the curve re-"ferred to. The expression was used in the ordinance of "1787 and seems to have been treated with some liberality "or flexibility of adjustment in that case and I think should "receive a like significance in the present. It is an evident "fact that no point within the jurisdiction of the State of "Illinois on the shore of the lake can be reached without "striking, in a large or general sense, the southerly bend or "curve of the lake. As the line was to be determined by "actual survey at a future period, and as the engineering "problems involved in the fixing of the line concerned chief-"ly the grantee rather than the United States, the grantor, "it seems reasonable that a considerable latitude was intend-"ed to be left by the parties with regard to the precise point "of terminus. If I understand the language of the Court in

"its literal sense, it would require the fixing of a terminus at "a point considerably east of the territorial limits of the "State of Illinois and one which would be arbitrarily gov- "erned by the line of the shore rather than by those ques- "tions of general utility and policy which are supposed to "have been in the mind of the contracting parties. If the "above view be correct, the argument that the benefits of the "act of 1822 have lapsed by reason of the selection of a dif- "ferent terminus, would seem invalid."

(The above portion of Judge Allen's opinion is not reported in the Federal Reporter.)

The canal as constructed is upon the route contemplated by the act of 1822. Not only is this true, but the record demonstrates that, with some slight variations at its easterly end, the canal was constructed upon the identical route surveyed and located by Post and Paul in the year 1824.

Justus Post and Rene Paul were employed by the commissioners, designated in the act of February 14, 1823, to explore the country and survey the route of the contemplated canal between the Illinois river and Lake Michigan. In this work Justus Post was engaged fifty-four days, in the fall of 1823, for which he was paid by the commissioners, in December of that year, $324.00. (Record p. 35.)

Rene Paul was engaged in this work 121 days during the years 1823 and 1824, for which he was subsequently paid by the State, $480.00. (Record p. 38.)

That the map, "Exhibit C," is the map of the survey and route of the contemplated canal made by Post and Paul in the years 1823 and 1824, is too plain for argument. The

map speaks for itself. It is endorsed, "Map of that part of "the State of Illinois through which it is contemplated to "construct a canal. Scale 2½ miles to the inch. By J. Post "& R. Paul." Within the small circle at the left side is endorsed the following: "A. D. 1824." (Record p. 44.)

Mathewson testified that since the early forties this map has been among the files of the canal commissioners' office, and has always been known and referred to as the Post & Paul map. (Record p. 44.)

On September 23, 1829, this map was taken from the office of the secretary of state by the canal commissioners, for the purpose of locating and examining the *canal route from Lake Michigan to the falls of the Illinois river.* (Record p. 26.)

On December 25, 1829—three months and two days thereafter—the Thompson map, "Exhibit B," (Record p. 28) was transmitted by the governor to the treasury department of the United States.

The route of the canal, as delineated upon these two maps, passes through the same sections and, with the exception of some slight variations near the eastern terminus, is practically identical. The maps are the same in their plan and general make up. The endorsements upon these two maps, except the scale, name of maker, and date, are alike. An examination of these maps proves conclusively that the Thompson map, "Exhibit B," was a tracing or copy of the Post & Paul map, "Exhibit C," with this addition, that the lands selected by the State were designated in red upon the Thompson map. The record shows that the canal was constructed upon the route indicated by the Thompson map.

We submit that the record in this case conclusively

demonstrates that the Illinois and Michigan Canal was practically constructed upon the route as surveyed and located by Post and Paul in the years 1823 and 1824. That there were some slight deviations from this route near the eastern terminus, made necessary by the engineering problems involved, we do not deny. This, from the very nature of things, must have been contemplated by Congress. Moreover, neither appellees nor any one else, other than the government, can be heard to complain on this account.

In the case of Van Wyck vs. Knevals, 106 U. S., 368, the Court, per Justice Field, in passing upon this precise question, say:

"A third party cannot take upon himself to enforce con-
"ditions attached to the grant when the government does
"not complain of their breach. The holder of an invalid title
"does not strengthen his position by showing how badly
"the government has been treated with respect to the prop-
"erty. As to the alleged deviation of the road constructed,
"from the route laid down in the map, admitting such to be
"the fact, the defendant is in no position to complain of it;
"the lands in controversy are within the required limit,
"whether that be measured from one line or the other."

The third reason assigned by Justice Schofield, to-wit, ***that the State did nothing under the act of 1822 and that the memorial of 1826 evidenced an intent to abandon the grant and apply to Congress for aid to construct another and different canal,*** is we respectfully submit, absolutely without any foundation in fact.

On February 14, 1823, the general assembly passed an act, constituting certain persons a board of commissioners,

to construct and devise measures requisite to open the canal between the waters of Lake Michigan and the Illinois river. It authorized said board to survey and locate the route of the canal and cause maps thereof to be made; to recommend plans for the construction and completion of the canal; to procure estimates of the probable cost thereof, and make a report of their proceedings to the next general assembly.

Pursuant to said act, Post and Paul were employed by said commissioners, during the years 1823 and 1824, and pursuant to such employment, explored the territory, surveyed and located the route of said canal, and prepared a map and profile thereof.

On November 16, 1824, the governor of the State of Illinois, in his message, informed the general assembly *that the commissioners would make a report, which would enable it to understand in what manner the work of opening the canal could best be accomplished.* (Abstract p. 27.)

On November 20, 1824, a memorial was presented to the house of representatives, soliciting congress for a grant of land of the depth of one section on each side of *the canal proposed to be opened between Lake Michigan and the Illinois river.* (Record p. 19.) This memorial was subsequently amended and adopted by both the house and the senate.

It will hardly be claimed that when this memorial was adopted in 1824, that the State had in view any canal other than the one contemplated by the act of 1822. It is apparent that at an early date the general assembly foresaw that the contemplated canal could not be constructed without congressional aid, and the memorial of 1824 was adopted pursuant to such conclusion.

On January 8, 1825, the report of the canal commis-

sioners was taken up by the house and referred to its committee on internal improvements. This report, as shown by the record, was printed in pamphlet form. No copy of this report or any record thereof is now extant.

On January 10, 1825, a resolution was adopted by the house, directing the governor to forward to the president of the United States and our members in congress a copy of the canal commissioners' report, with maps thereto annexed. This resolution was afterwards concurred in by the senate. (Record p. 42.)

On January 17, 1825, the general assembly passed an act, incorporating the Illinois and Michigan Canal Company. This act required the corporation to commence the construction of a canal connecting the Illinois river with Lake Michigan, and to proceed with the work as rapidly as possible. It empowered the corporation to operate said canal for a period of fifty years, and fixed the maximum rates of toll to be charged. It provided that after the expiration of fifty years the State should have the right to purchase the canal upon certain terms therein specified.

This act continued in force for the period of about one year. The corporation was unable to dispose of its capital stock, and on January 13, 1826, returned its charter to the general assembly, with a communication which closed as follows: "From the information which has been received, it is "not believed that the stock could have been disposed of "during the past year; nor is it believed that it can be dis-"posed of for several years to come, unless Congress will "make a donation of land; but with a reasonable grant, the "directors are of opinion the stock would be subscribed and "the canal promptly executed by the capitalists of the At-

"lantic States. Presuming that the object the general as-"sembly had in view in incorporating a company was to have "the work immediately undertaken, and not believing that "this can be done without a donation of land, which it is "thought Congress would be more willing to make to the "State than to the company * * * the president and di-"rectors respectfully return their charter to the hands from "whence they received it *."

On January 20, 1826, the general assembly repealed the act incorporating the Illinois and Michigan Canal Company. Section 2 of the repealing act was as follows: "That it shall "be the duty of the governor of this State to endeavor to as-"certain the best terms on which loans can be obtained on "behalf of the State, for the purpose of constructing a canal "from Lake Michigan to the Illinois river, and report the "same to the general assembly, at their next session." (Record p. 21.)

The memorial adopted by the general assembly in January, 1826, was in part as follows:

"At their present session, your memorialists have re-"pealed the charter and their only hope of soon beginning "the work depends upon the liberality of your honorable "body. Your memorialists *have caused the route to be ex-"plored* and estimates to be made of the probable expenses "of the work, from which it appears that the cost of con-"structing the canal will not be less than $600,000, and may "possibly amount to $700,000. To the end, therefore, that "your memorialists may be enabled to commence and com-"plete this great and useful work, we pray your honorable "body to grant to this State the respective townships of land "through which *the contemplated canal* may pass." (Record p. 20.)

The contention that this memorial contemplated a different canal from the one provided for by the act of 1822, is refuted by the very language of the memorial itself.

On December 5, 1826, the governor of the State of Illinois, in his message to the general assembly, used the following language:

"In the fulfillment of the duty imposed by the legislat-"ure, the executive has endeavored to ascertain the terms on "which a loan could be procured by the State, for the pur-"pose of constructing a canal from Lake Michigan to the "Illinois river * * * . From the best information, how-"ever which has been received, it is confidently believed that "if Congress should make a liberal grant of land there will be "no difficulty on the part of the State in obtaining a loan "at six per cent per annum. Considering the favorable man-"ner in which our application for a grant of land was received "by Congress at its last session, would it not be wise in the "legislature to adopt, at its present session, appropriate "measures to commence this great work of improvement, "*predicated on the liberal grant of land by Congress* previous "to the meeting of the next general assembly?" (Record p. 21.)

This message was delivered some three months before the passage of the act of 1827. It shows that the object of the memorial was to procure a grant of land to aid in the construction of the canal contemplated by the act of 1822. It recommends that the State immediately begin the work of constructing the canal, predicated upon a liberal grant of land by Congress in accordance with the prayer of said memorial.

The reasonable conclusion is, that the act of Congress

of March 2, 1827, was passed, in compliance with said memorial, to aid the State in constructing the canal provided for by the act of 1822; that these two acts must be taken together; that they have reference to one and the same canal and that the act, of 1827, was intended as an assisting or an enabling act.

The act of 1822, by its title, authorizes the State *to open a canal through the public lands connecting the Illinois river with Lake Michigan*. The act of 1827 *grants a quantity of land to the State for the purpose of aiding in opening a canal*. The act of 1822 authorizes the State to survey and mark through the public lands the route of a canal. The act of 1827 confers no such authority. *If the grant of 1822 is not in force, the State has absolutely no title to the bed of the canal, through the even sections reserved by the United States under the act of 1827.* The act of 1822 provides that a map of the route of the canal be returned to the treasury department. The act of 1827 does not. The Thompson map was returned by the State in 1829, and accepted by the government under the act of 1822. No other act required, or contemplated the return of a map of the route of the canal.

The act of 1827 pre-supposes a right to construct a canal across the public lands. Its provisions and language clearly indicate that its object and intent was to aid the State in constructing a canal theretofore authorized and provided for. The only act of Congress which authorized the State to construct such canal across the public lands was that of 1822.

In the case of Wheeler vs. City of Chicago, 68 Fed. Rep., pp. 527, 528, Judge Allen, in construing these two acts of Congress, says:

"Under my view of the case these grants—that of 1822, "authorizing the State to survey through the public lands "a route of the canal connecting the Illinois river with the "southern bend of Lake Michigan, granting ninety feet on "each side of the canal to the State, and the grant of 1827 to "the State, of a quantity of land equal to one-half of five sec- "tions in width on each side of said canal, to aid said State "in opening a canal to unite the waters of the Illinois river "with those of Lake Michigan—must be taken together. * "* *. The last was a clear recognition by Congress of the "continuing force of the first one, and extended the time for "the commencement of the work on the canal for five years "from March, 1827, and its completion for twenty years from "that date * * *. Under the congressional grant of 1822 "the strip of land in dispute became vested in the State of Il- "linois at once. A legislative grant operates as a law as well as "for the transfer of the property, and has such force as the in- "tent of the legislature requires. I have no doubt that the title "vested in the State at once; that these conditions with ref- "erence to commencing the work and the completion of the "work were conditions subsequent, and not as claimed by "plaintiff's counsel, conditions precedent * * *. The act "of 1827 clearly extended the time for the commencment of "the work until 1832—that is my understanding—and its "completion until 1847. In 1829, it is shown in the evidence, "that Governor Edwards forwarded to the department at "Washington a copy of the survey and location of the canal. "That was within two years after this act of 1827 was passed "and there never having been a forfeiture the grants were in "full force and effect and the State had title certainly to this "strip of land, for I understand this is a part of the ninety "feet."

There is no question but that the State complied with all the requirements of the act of 1827.

Under these decisions and the evidence in this case it must be held:

First. "That the act of Congress of March 2, "1827, is an assisting or enabling act to the act of 1822, and "was intended to assist the State of Illinois in constructing "the canal mentioned in the act of 1822 and enable the State "to build and pay for the same."

"Second. That the object and intention of the act of "Congress of March 2, 1827, was to aid the State of Illinois "to build and open the canal referred to in the act of March "30, 1822, and to give to said State further time to construct "and complete said canal."

"Third. That no act of the legislature of the State of "Illinois was necessary to be passed, accepting specifically the grant of land made to the State by the act of Congress "of March 30, 1822, but that the act of the legislature of the "State of Illinois of February 14, 1823, and the survey and "marking of the route of said canal by surveyors employed "by the State, together with the other evidence in the case, "constitute, in law an acceptance by the State of the grant "of lands made by the act of Congress of March 30, 1822."

"Fourth. That under the evidence in this case the State "of Illinois accepted the grant made by the act of Congress "of March 30, 1822."

"Fifth. That the State of Illinois accepted the grants "of land made by both the acts of Congress of March 30, "1822, and March 2, 1827."

"Sixth. That the said act of Congress of March 30, 1822,

"and the act of Congress of March 2, 1827, entitled, 'An act
" 'to grant a quantity of land to the State of Illinois, for the
" 'purpose of aiding in opening a canal to connect the waters
" 'of the Illinois river with those of Lake Michigan,' must be
"taken together as referring to one and the same canal."

VI.

LAND GRANTS SHOULD BE CONSTRUED LIBERALLY, SO AS TO CARRY OUT AS FULLY AS POSSIBLE THE INTENTION OF CONGRESS.

The rule that grants of this character, like transfers between individuals, are to be construed strictly against the grantee, no longer prevails.

In Vol. 9, Am. & Eng. Ency., p. 57 (end of note 3), the author, after an exhaustive review of the decisions upon this subject, says:

"On the whole, the doctrine of the strict construction "of land grants would seem for the time, at least, not to be "favored."

The rule now prevailing is, *that a legislative grant operates as a law as well as a transfer of property, and should be given such force as the intent of the Legislature requires.*

In the case of Railway vs. Railway, 97 U. S., 497, the Court, per Justice Field, say:

"It is always to be borne in mind, in construing a con- "gressional grant, that the act by which it is made is a law "as well as a conveyance, and such effect must be given to it "as will carry out the intent of Congress. The intent should "not be defeated by applying to the grant the rules of the "common law, which are properly applicable only to trans- "fers between private parties * * *. But the rules of the "common law must yield in this, as in all other cases, to the "legislative will. As to the intent of Congress in the grant "to the plaintiff there can be no reasonable doubt. It was "to aid in the construction of the road by a gift of lands "along its route, without reservation of rights except such as

"were specifically mentioned, and the location of the route "being left within certain general limits to the action of the "plaintiff. When the location was made and the sections "granted ascertained, the title of the plaintiff took effect by "relation as to the date of the act, except as to the reserva- "tions mentioned; the act having the same operation upon "the sections as if they had been specifically described in it."

In the case of Railroad vs. Barney, 113 U. S., 625, the Court say:

"The solution of these questions depends, of course, "upon the construction given to the acts making the grants; "and they are to receive such a construction as will carry "out the intent of Congress, however difficult it might be to "give full effect to the language used if the grants were by "instruments of private conveyance. To ascertain that in- "tent, we must look to the condition of the country when "the acts were passed, as well as to the purpose declared on "their face, and read all parts of them together."

In the case of Railroad vs. Forsythe, 159 U. S., 159, the Court, per Justice Brewer, say:

"But it is a rule of equal if not higher significance, that "every act of Congress making a grant is to be treated both "as a law and a grant, and the intent of Congress, when ascer- "tained, is to control in the interpretation of the law * * . "They are to receive such a construction as will carry out "the intent of Congress, however difficult it might be to give "full effect to the language used if the grants were by instru- "ments of private conveyance. To ascertain that intent, we "must look to the condition of the country when the acts "were passed, as well as to the purpose declared on their "face, and read all parts of them together."

If the rules of construction announced in the above cases be applied to the acts of 1822 and 1827, in the light of the record in this case, the conclusion, it seems to us, must necessarily be that the State has absolute title to the ninety-foot strip.

VII.

WHEN THE NORTHWEST QUARTER OF SECTION TEN WAS ENTERED AND PURCHASED BY APPELLEES' GRANTORS IN 1835, THEY TOOK THE SAME SUBJECT TO THE GRANTS PREVIOUSLY MADE BY THE ACTS OF 1822 AND 1827.

The route of the canal, as surveyed by Post and Paul in the year 1824, extended through the northwest quarter of said section 10.

As before shown the Thompson map was returned to the treasury department of the United States in the year 1829.

The route of the canal, as delineated upon the Thompson map, extended through the northwest quarter of said section 10. The northwest quarter of said section 10 was not purchased from the government and entered until the year 1835—six years after the return of the Thompson map. (Record p. 11.) Upon the return of the Thompson map in the year 1829, the route of the canal became definitely fixed. The location of the ninety-foot strip became capable of identification and certain, and the title of the State specifically attached to it and related back to the date of the act.

When the land was entered by appellees' grantors in the year 1835, they were chargeable with notice, not only of the acts of 1822 and 1827, but with notice of the definite location of the route of the canal and the ninety-foot strip on each side thereof. The fact that the land within the route of the canal and the ninety-foot strip was not withdrawn from market by the land department, in no sense affected such notice.

In the case of Van Wyck vs. Knevals, 106 U. S., 366, the Court say:

"The inquiry then arises, when is the route of the road "to be considered as definitely fixed, so that the grant at- "taches to the adjoining sections. The complainant below "contends that the route is definitely fixed, within the mean- "ing of the act of Congress, when the company files with the "secretary of the interior a map of its lines, approved by its "directors, designating the route of the proposed road. On "the other hand, the defendant * contends that the route "cannot be deemed definitely fixed, so that the grant at- "taches to any particular sections and cuts off the right of "entry thereof, until the lands are withdrawn from market "by order of the secretary of the interior and notice of the "order of withdrawal is communicated to the local land of- "ficers in the districts in which the lands are situated. We "are of opinion that the position of the complainant is the "correct one. * * * When a route is adopted by the com- "pany and the map designating it is filed with the secretary "of the interior and accepted by that officer, the route is "established; it is, in the language of the act, definitely fixed "and cannot be the subject of future change so as to affect "the grant, except upon legislative consent. * * * It "then becomes the duty of the secretary to withdraw the "lands granted from market. But if he should neglect this "duty, the neglect would not impair the rights of the com- "pany, however prejudicial it might prove to others. Its "rights are not made dependent upon the issue of the secre- "tary's order or upon notice of the withdrawal being given "to the land officers."

In the case of Walden vs. Knevals, 114 U. S., 167, the Court quotes extensively from the above opinion and confirms the doctrine therein announced.

Before the route of the canal was definitely fixed all persons dealing with the public lands were chargeable with notice of the floating title of the State to a ninety-foot strip, and with notice that upon the location of the route of the canal that such title would attach to ninety feet of land on each side thereof.

The case of Railroad vs. Baldwin, 103 U. S., 426, is directly in point and in our opinion, decisive of this case.

That was an action by Baldwin to recover of the railroad company damages for entering upon his land in Nebraska and appropriating in the construction of its road a strip two hundred feet in width and two hundred rods in length. The company claimed the right of way over the land of this width under an act of Congress entitled, "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph."

By section 1 of the act there is granted to the State of Kansas * * * to construct and operate a railroad * * every alternate section of land designated by odd numbers for ten sections in width on each side of the road to the point of intersection.

By section 6 it is provided, "That the right of way through the public lands be and the same is hereby granted to said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road, material for the construction thereof. Said way is granted to the said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain. Also all necessary ground for

station buildings, work shops, depots, machine shops, switches, side-tracks, turn-tables and water station."

When the grant was made by Congress the land claimed by Baldwin was vacant and unoccupied land of the United States. The line of the road over it was not definitely located until October, 1871. He acquired whatever rights he possesses in October, 1869. The defendant contended that the plaintiff took the land subject to its right of way. He contends that the grant of the right of way took effect only from the date at which the company filed its maps designating the route with the secretary of the interior.

This act is, in all material respects, similar to the canal acts in question excepting that the right of way through the public lands for the purpose of constructing a canal was given to the State of Illinois by one act and the donation of land to aid in the construction of the canal was given by a subsequent act of Congress.

This case is stronger for plaintiffs in error than that, for the reason that the defendant in error acquired her title to the land in dispute after the State of Illinois had definitely located the route of the canal and filed the maps thereof with the proper officers of the United States. In that case, as in this, the title of the individual claimant was acquired after the passage of the acts of Congress.

In passing upon that question this Court, by Justice Field, said:

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the prog-

ress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of the opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

In the case of Van Wyck vs. Knevals, 106 U. S., 365, the Court say:

"The difficulty in giving full operation to it arises from "the fact that the sections designated as granted are in- "capable of identification until the route of the road is defi- "nitely fixed. When that route is thus established, the grant 'takes effect upon the sections by relation as of the date of "the act of Congress. In that sense we say that the grant is "one *in præsenti*. It cuts off all claims, other than those

"mentioned, to any portion of the lands from the date of the "act, and passes the title as fully as though the sections had "been capable of identification."

In the case of Railway vs. Cook, 163 U. S., 497, the Court, per Chief Justice Fuller, say:

"The grant of the lands and the grant of the right of "way were alike grants *in præsenti* and stood on the same "footing, so that before definite location, all persons acquir-"ing any portion of the public lands, after the passage of the "act, took the same subject to the right of way for the pro-"posed road."

In the case of Wheeler vs. City of Chicago, 68 Fed. Rep., 528, Judge Allen, in construing the acts of 1822 and 1827, says:

"If I am right, then in 1834, when Welch purchased "from the United States, he was compelled to take notice of "the two public laws referred to and the grants thereunder "to the State, and, of course, could get no title from the "government to the ninety feet on either side of the "canal * * *."

If these decisions are to be followed, the title to the ninety feet in width on the south side of the Illinois and Michigan Canal became vested in the State of Illinois by the act of congress of March 30, 1822, and having remained in the State of Illinois ever since, the plaintiff's grantors acquired no title to that part of the west half of the northwest quarter and that part of the west half of the southeast quarter of the northwest quarter of section 10, in township thirty-three north, range 3 east of the third principal meridian, which lies within said ninety feet, by the entries of said lands made by Henry M. Warnock and Henry L. Brush in the

year A. D. 1835, nor did the plaintiff, by mesne conveyances from the said Warnock and the said Brush down to her, acquire any title to or the right to the possession of any part of said ninety feet; and the defendants, as agents of and acting for the State of Illinois, had the lawful right to remove the plaintiff's fence therefrom.

VIII.

THE STATUTE OF LIMITATIONS DOES NOT RUN AGAINST THE STATE.

The fact, that defendants in error had, at the time of the bringing of this suit, been in possession of the land in dispute for more than twenty years, will not give them title as against the State. That the statute of limitations does not apply to the government, has been frequently held by this and other Courts.

In Gibson vs. Cheteau, 13 Wallace, 100, this Court said:

"It declares it to be well settled, that statutes of limitation of a State cannot run against he United States nor affect their grantees until the title has passed from the proprietary sovereignity."

This proposition is supported by numerous decisions of the Supreme Court of Illinois.

In Cartlett vs. The People, et al., 151 Ill., 23, that Court says:

"In the absence of any statutory period of limitation, it is held in this county, that the attorney general may file an information on behalf of the people at any time, and that lapse of time constitutes no bar to the proceeding in conformity to the maxim, ***nullum tempus occurrit regi.*** * * It is a familiar doctrine, that the State is not embraced within the statute of limitations unless specially named, and, by analogy, would not fall within the doctrine of estoppel."

In People vs. Brown, 67 Ill., 438, it was said:

"It is a familiar doctrine, that the State is not embraced within the statute of limitations, unless specially named and by analogy, would not fall within the doctrine of estoppel.

Its rights, revenues and property would be a fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case where a comparatively small amount is involved, it must be applied where millions are involved.

"The doctrine so well settled that no *laches* can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any of its officials."

While the officers of the State may have been negligent of their duty, in permitting defendants in error to occupy the public land of the State for so long a time, under these decisions, that possession can never ripen into a title as against the State.

This writ of error is prosecuted by the State of Illinois for the purpose of having the title to the ninety-foot strip through the even sections finally settled. It has never been passed upon by this Court. While the property involved in this suit may be and probably is of small value, the principle involved is an important one from a legal and financial standpoint. By the decision of the Supreme Court of Illinois in this case the title of the State to a large quantity of land, and a great many lots, throughout the one hundred-mile length of the canal, in the even sections, has been placed in dispute.

We respectfully submit that under the decisions above cited, the State of Illinois became the owner under the acts of 1822 and 1827 of a strip of land ninety feet wide on each side of the canal, through the even sections, and that the Supreme Court of Illinois erred in finding otherwise.

Respectfully submitted,

HOWARD M. SNAPP,

Attorney for plaintiff in error.

No. 168.

Brief of Counsel

FILED
FEB 28 1901
JAMES H. MCKENNEY
Clerk

Filed Feb. 28, 1901.

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 168.

FRANK X. WERLING AND EUGENE SMITH, *Plaintiffs in Error,* vs. EMILY E. INGERSOLL AND GEORGE INGERSOLL, *Defendants in Error.*	*In Error to the Supreme Court of Illinois.*

Affidavits of Clarence E. Snively, Howard O. Hilton and Homer J. Tice, The Canal Commissioners of the State of Illinois; Frank X. Werling and Eugene Smith, Plaintiffs in Error; Harry Witte and W. T. Keating, and Brief and Argument of Plaintiffs in Error, in opposition to motion of Defendants in Error to dismiss.

HOWARD M. SNAPP,

Attorney and Solicitor in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 168.

FRANK X. WERLING AND
EUGENE SMITH,
Plaintiff's in Error,

vs.

EMILY E. INGERSOLL AND
GEORGE INGERSOLL,
Defendants in Error.

In Error to the Supreme Court of Illinois.

AFFIDAVITS.

FRANK X. WERLING AND
EUGENE SMITH,
Plaintiffs in Error,

vs.

EMILY E. INGERSOLL AND
GEORGE INGERSOLL,
Defendants in Error.

In Error to the Supreme Court of Illinois.

Clarence E. Snively, Howard O. Hilton and Homer J. Tice, being first duly sworn according to law, depose and say: That they are the "Canal Commissioners" of the State

of Illinois, duly appointed under the laws relative to the Illinois and Michigan Canal and as such have charge as agents of said State, of said Illinois and Michigan Canal and the canal lands of the State of Illinois.

That under their supervision and control as such "Canal Commissioners" is the "Illinois and Michigan Canal" and the canal lands owned, possessed and controlled by the State of Illinois, extending from the City of Chicago, in the State of Illinois, to the City of Peru, on the Illinois river, a distance of about one hundred miles, all of which is by the statutes of said State peculiarly within the charge and control of these affiants as such "Canal Commissioners."

That said "Illinois and Michigan Canal" was completed and opened for business about the year 1847, throughout its whole length, and from that time has been under the jurisdiction and control of the State of Illinois.

That on November 13, 1897, plaintiffs in error, Frank X. Werling and Eugene Smith, were duly constituted agents and employes of the State of Illinois, under these affiants as such "Canal Commissioners," and that on said date said plaintiffs in error, acting solely for and on behalf of the State of Illinois and under and by virtue and direction of these affiants as "Canal Commissioners" removed certain fences erected by the defendants in error in section ten (10), township thirty-three (33), north, range three (3), east of the third principal meridian, LaSalle County, Illinois.

That the land upon which said fences were erected is claimed by the "Canal Commissioners" to be part of the canal lands of the State of Illinois, and that the said State became vested with the title thereto by virtue of certain acts of Congress of March 30, 1822, and March 2, 1827.

That thereupon Emily E. and George Ingersoll, defendants in error herein, brought an action of trespass in the Circuit Court of LaSalle County, Illinois, against plaintiffs in error herein, to recover damages for the removal of said fences.

That said cause was tried in the said Circuit Court of LaSalle County under a stipulation of facts and oral evidence introduced by the parties, and judgment was entered against the plaintiffs in error for the sum of fifty ($50) dollars, and costs of suit.

These affiants further say, that said stipulation was entered into by the parties to said cause, for the sole and only purpose of making oral proof of the records of the United States and the State of Illinois and the Canal Commissioners and the Recorder's office of LaSalle County, Illinois, unnecessary, and that the matters therein presented were litigated in good faith, about a matter in actual controversy between the parties, to-wit: the title to the land in dispute, and that the judgment of said Circuit Court was not sought with any other design than to adjudge and settle the law relative to the matter in actual controversy between the parties to the record.

Affiants further say, that the appeal from said judgment to the Supreme Court of Illinois, and this writ of error from said Supreme Court of Illinois was, and is, prosecuted by these affiants as agents of the State of Illinois by direction of the Governor thereof, for the sole and only purpose of settling and adjudicating the law relative to the controversy between the parties to the record.

Affiants further say that since this writ of error was per-

fected the title to other land in possession of the State of Illinois, under the above-mentioned acts of Congress, some of it under lease to various parties, has been disputed and payment of rent refused.

Affiants further say: That as "Canal Commissioners" they have the exclusive control and custody of the canal funds of the State of Illinois, and the distribution thereof, and that they have not paid nor authorized any one to pay for them, the judgment of the Circuit Court of LaSalle County against the plaintiffs in error, or the interest or costs thereon, and that if such judgment, interest and costs has been paid to the defendants in error herein, or their attorney, or any person acting for them, or paid to or deposited with the Clerk of the Circuit Court of LaSalle County, Illinois, such payment or deposit was made without the knowledge or consent or authority of the Canal Commissioners, and in fraud of the property rights and interests of the State of Illinois.

Affiants further say: That they have no knowledge except that obtained from Exhibit "B" to Robert Carr's affidavit filed herein, of the conveyance of the property in dispute by defendants in error to Lorenzo Leland, and that if such a conveyance has in fact been made it was made without the knowledge or procurement of these affiants, and was not made for the purpose of vesting the title to said land in the State of Illinois, in settlement of this litigation. That Lorenzo Leland is not a party to the record, nor connected in any way with the State of Illinois, and that such conveyance, made *pendente lite* is hostile to the interests of the State of Illinois and in fraud thereof.

Affiants further say: That on December 5, 1899, the

Canal Commissioners made a lease to The Ottawa Development Company, a copy of which is attached hereto as Exhibit "A." That said lease covers only about one-third of the land involved in this suit, and was not made by these affiants for the purpose of settling or in any way affecting this litigation.

Affiants further say: That the title of The Sanitary District of Chicago to the land along the east bank of the Illinois and Michigan Canal through the City of Joliet can be in no way affected by the decision of this case. The land mentioned by Isham Randolph as being necessary to the development of water power at Joliet by said Sanitary District lies wholly within section sixteen (16) granted to the State of Illinois for the use of schools by an act of Congress, April 18, 1818, and was never a part of the canal lands of said State.

CLARENCE E. SNIVELY,
HOWARD O. HILTON,
HOMER J. TICE.

Subscribed and sworn to before me this 6th day of February, A. D. 1901.

ERASTUS W. WILLARD,
[Notarial Seal] Notary Public.

EXHIBIT A.

THIS INDENTURE, made and entered into this fifth (5th) day of December, in the year of our Lord one thousand eight hundred and ninety-nine (1899), between THE CANAL COMMISSIONERS OF THE STATE OF ILLINOIS, of the first part, and the OTTAWA DEVELOPMENT ASSOCIATION, of Ottawa, Illinois, of the second part.

WITNESSETH, that the said party of the first part, for the consideration hereinafter mentioned, agrees to lease unto the said party of the second part, for the term of twenty (20) years, that is, from the fifth (5th) day of December in the year of our Lord one thousand eight hundred and ninety-nine (1899), until the fifth (5th) day of December in the year of our Lord nineteen hundred and nineteen (1919), all the right the State of Illinois possesses to that portion of the reserved ninety (90) foot strip lying on the towpath side of the canal, in section ten (10) and eleven (11), in township thirty-three (33), north range three (3), east, described as follows, viz: the outer or southerly forty (40) feet of the reserved ninety (90) foot strip in said section eleven (11), commencing one hundred and twenty (120) feet west of the northeast corner of block twenty-one (21) in the State's addition to Ottawa in the City of Ottawa, Illinois, running thence west a distance of five hundred (500) feet, and beginning from this point the outer thirty (30) feet of the reserved ninety (90) foot strip in said section eleven (11), running thence west and southwest a distance of about eighteen hundred (1800) feet; and the outer or southerly thirty (30) feet of said ninety (90) foot strip in said section ten (10), beginning on the east line of said section ten (10) and running thence west and southwest to the west line of said section 10.

And the said party of the second part, for the use and occupation of said land, does hereby covenant and agree to and with the said party of the first part, that it will pay to the said party of the first part, as rent, the sum of twelve hundred ($1,200.00) dollars, payable in advance.

It is further covenanted and agreed on the part of said party of the second part, that it will not re-let said tract of

land, or any part thereof, without the consent, in writing, of the said party of the first part.

It is further agreed, that the said party of the second part shall erect no buildings, wharves, or other structures, that will in any manner obstruct the free navigation of the canal or a passage for a towpath or other canal purposes.

AND IT IS FURTHER EXPRESSLY AGREED BY AND BETWEEN THE SAID PARTIES, that the party of the first part shall have the right at any time and at all times to enter upon the premises hereby leased and use the whole or any part thereof, for the purpose of enlarging the canal, or repairing or changing the banks of the same, upon the condition that the rents shall be proportionately abated for the time and that part of the premises so re-taken and used.

IT IS FURTHER COVENANTED AND AGREED BETWEEN THE SAID PARTIES, that in case of non-payment of rent, or any part thereof, as the same falls due, according to the terms of this lease, or the violation by the party of the second part of any of the above covenants, the said party of the first part, by its agents or attorney, shall possess the right to declare this lease void, to enter and distrain any property belonging to the said party of the second part, whether the same be exempt from execution and distress by law or not, for such rent, and a lien on said property is hereby created in favor of the said party of the first part, for said rent, and the party of the second part shall surrender said premises to said party of the first part without unnecessary delay or resort to litigation.

IT IS FURTHER COVENANTED AND AGREED BETWEEN SAID PARTIES, that the said party of the

second part, shall occupy the said premises for the purpose of constructing and operating, or causing to be constructed or operated, a siding or switch from the main line of the Chicago, Burlington & Quincy Railroad Company on Walnut street in said City of Ottawa, for the transportation of freights, by the said Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railroad Company to and from manufacturing industries located and to be located on the land of said second party, at or near the western limits of said City of Ottawa, and for no other purpose, and by no other persons or corporations whatsoever.

For the full and faithful performance of the covenants and stipulations herein contained, to be performed on the part of the party of the second part, the said party of the second part binds itself, its successors, assigns and legal representatives, and are firmly bound by these presents.

In Testimony Whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

THE CANAL COMMISSIONERS,

[Seal] By C. E. SNIVELY, President.

HOWARD O. HILTON, Secretary.

OTTAWA DEVELOPMENT ASSOCIATION,

[Seal] AL. F. SCHOCH, Prest. [Seal]

GEO. M. TRIMBLE, Secy. [Seal]

FRANK X. WERLING AND EUGENE SMITH,
Plaintiffs in Error,
vs.
EMILY E. INGERSOLL AND GEORGE INGERSOLL,
Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

STATE OF ILLINOIS, LaSalle County, } ss.

Frank X. Werling and Eugene Smith, being first duly sworn, on oath say, that they are the plaintiffs in error in the above entitled cause. That on November 13, 1897, they were duly constituted agents and employes of the State of Illinois, under the Canal Commissioners of said State, and that on said date these affiants, acting for and on behalf of the State of Illinois, and under and by virtue of the authority and direction of the Canal Commissioners, removed certain fences erected by the defendants in error in section ten (10), township thirty-three (33) north, range three (3), east of the third principal meridian, LaSalle County, Illinois. That defendants in error brought suit against, and recovered, a judgment against these affiants in the Circuit Court of said LaSalle County for removing said fences, which judgment was affirmed by the Supreme Court of Illinois, from which judgment of the State of Illinois the above writ of error to this Court was prosecuted, and is now pending and undisposed of.

Affiants further say, that they or neither of them have paid or authorized any one to pay for them, the judgment of the Circuit Court of LaSalle County above mentioned, or the interest or costs thereon, and that if the amount of

said judgment, interest and costs has been paid to the defendants in error herein, or their attorneys, or any person acting for them, or paid to, or deposited with, the Clerk of the Circuit Court of LaSalle County, Illinois, such payment was made without the knowledge, consent or authority of these affiants.

FRANK X. WERLING,
EUGENE SMITH.

Subscribed and sworn to before me this 7th day of February, A. D. 1901.

MAY E. DOLE,
Notary Public.

[Notarial Seal]

FRANK X. WERLING AND EUGENE SMITH,
Complainants in Error,
vs.
EMILY E. INGERSOLL AND GEORGE INGERSOLL,
Defendants in Error.

In Error to the Supreme Court of Illinois.

STATE OF ILLINOIS, County of LaSalle, } ss.

Harry Witte, being first duly sworn according to law, on his oath deposes and says that he is the Deputy Clerk of the Circuit Court of LaSalle County, Illinois, and that upon the 25th day of January, 1901, William H. Beebe deposited with the Clerk of the said Circuit Court of LaSalle County, Illinois, the full amount of the judgment, interest and costs awarded and adjudged to the said defendants in error by the judgment of the Circuit Court of LaSalle County, Illinois, in the case herein, entitled, Emily E. Ingersoll and George Ingersoll vs. Frank X. Werling and Eugene Smith.

Affiant further says that the amount of said judgment, interest and costs, amounted to $64.40, and the same was paid to the Circuit Clerk as above stated, by the said William H. Beebe, and not by Robert Carr.

Affiant further says that at the time of the said payment by the said Beebe, the following endorsement was made upon the judgment docket in said cause, to-wit: "January 25, 1901. Received of W. H. Beebe, agent, the sum of $64.40, being in full of judgment, interest and costs. Henry Phillips, Clerk."

HARRY R. WITTE. [Seal]

Subscribed and sworn to before me this 12th day of Feby., A. D. 1901.

[Notarial Seal] F. A. HATHWAY, County Clerk.

STATE OF ILLINOIS, }
County of Cook, } ss.

William T. Keating, being first duly sworn, on oath says that he is a resident of Cook County, State of Illinois, and was for nine years, and is now, an employe of the Sanitary District of Chicago. Affiant further says that he is personally acquainted with William H. Beebe, and that the said William H. Beebe was on the 23d and 25th day of January, A. D. 1901, and has been for the past three years, and is now, an employe in the law department of Sanitary District of Chicago.

W. T. KEATING.

Subscribed and sworn to before me this 18th day of February, A. D. 1901.

K. EBERTH,
Notary Public.

[Notarial Seal]

BRIEF.

The motion to dismiss is based upon these three propositions:

First. That there is no existing actual controversy between the parties for the reason that *since the trial* in the Circuit Court of LaSalle County, the *controversy* has been adjusted, by the grantee of defendants in error (plaintiffs below) recognizing the title of the State of Illinois to the land in controversy, and that the State has obtained all it can expect by a decision of this case in its favor.

Second. That the judgment of the Circuit Court in favor of the defendants in error (plaintiffs below) has been satisfied by payment.

Third. That this writ of error is being prosecuted by the Canal Commissioners for the purpose of obtaining the opinion of the Court upon a question of law, in which property to a large amount is involved, and in which the Canal Commissioners have an interest opposed to that of others not parties to the suit, who had no knowledge of it, and no opportunity of being heard in defense of their rights.

For convenience, the above propositions will be discussed in the order set out in the motion to dismiss.

I.

THAT THERE IS NO EXISTING CONTROVERSY BETWEEN THE PARTIES, BECAUSE THE GRANTEE OF DEFENDANTS IN ERROR, HAS RECOGNIZED THE TITLE OF THE STATE OF ILLINOIS TO THE LAND IN CONTROVERSY, SINCE THE TRIAL IN THE CIRCUIT COURT, AND THE STATE HAS OBTAINED ALL THAT IT CAN EXPECT BY A DECISION OF THIS COURT.

We think this proposition may properly be subdivided into two distinct admissions, viz:

First. That there *was* an existing actual controversy between the parties herein, over the title to the land in suit, ***until after*** the trial in the Circuit Court.

Second. That there is still a real, existing dispute between the parties, over the title to the land in suit, unless the record shows affirmatively that the title of the State has been recognized, and that the State has obtained all that it could expect to obtain by the judgment of this Court in its favor.

FIRST.

The first admission (that there was at first a real controversy between the parties), effectually disposes of the argument, based upon the case of Lord v. Veazie, 8 How., 225, "that this was *from the beginning* an attempt by a mere colorable dispute to obtain the opinion of the Court upon a question of law when there is no substantial controversy between those who appear as adverse parties to the suit;" and that phase of the question will be dropped.

SECOND.

Does the record show affirmatively that the title of the State of Illinois has been recognized, and that it has obtained all it can expect by a decision of this Court?

By reference to section 4, page 11, of the record, the Court will see that the State claimed title to 90 feet of land south of the canal across that part of section 10, marked "E. E. Ingersoll" as shown on the map at page 10 of the record. The Ingersolls claimed that the State has title to only the north *17* of that 90-foot strip, which is used as a towpath. The controversy, therefore, was over the title to a strip of land *73* feet wide lying 17 feet from the canal bed.

From a lease attached to the Canal Commissioners' affidavit, it appears that on *December 5, 1899*, The Canal Commissioners leased to the Ottawa Development Company, for a term of twenty years all the right of the State of Illinois to the SOUTHERLY 30 FEET of the 73 feet in controversy.

On *January 20, 1900*, Emily E. Ingersoll and George Ingersoll, defendants in error, conveyed to Lorenzo Leland, for a consideration of $500.00, the entire 73 feet in controversy.

(Defendant's affidavits, p. 14.)

Counsel for defendants in error present no argument on this question beyond the bare statement that, by the deed of the Ingersolls to Leland, and the lease of the Canal Commissioners to the Ottawa Development Company, "The State has succeeded in having its title recognized by grantee of defendants in error," and "The Canal Commissioners of the State of Illinois have obtained all they could recover in this case by judgment of this Court in their favor." (Argument, p. 2.)

That there is absolutely no merit in this position, is clear, when we consider what the relative positions of the parties will be if this writ of error should be dismissed.

It must be remembered that the judgment of the Circuit Court, affirmed by the Supreme Court of Illinois, finds the title of the entire 73 feet in the Ingersolls. A dismissal of this case by this Court will confirm that title, wipe out the claim of the State, and make the Ingersoll deed to Leland good against the world, unless the record shows such a relationship between the parties that the Leland title will enure to the State.

The only intimation in the record of such a relationship is found in the affidavit of Robert Carr (p. 10), who swears that Leland holds the title to the property of the Ottawa Development Company as trustee.

This statement of Carr's (together with his second affidavit as we will hereafter show), seems entitled to little credit, when we consider with what recklessness he swears (p. 11) that the lease of the Canal Commissioners to the Ottawa Development Company was for the property described in the deed from the Ingersolls to Leland, the lease itself being one of the public records of the State, open to the inspection of all, and a certified copy of which is obtainable at the office of the Canal Commissioners on request.

But, assume that the Ingersoll deed to Leland is, in effect, a conveyance to the Ottawa Development Company (a lessee of the State, to 30 feet only of the 73 feet in suit), and what then is the situation? If this writ of error is dismissed the title to the 43 feet of land in controversy, not included in the Canal Commissioners' lease, will be at once confirmed, either in Leland or the Ottawa Development Company, and the title of the State, instead of being recognized, will be forever lost, because, the estoppel

of the lessee to deny the landlords' title cannot be extended to land not included in the lease.

Taylor's Landlord and Tenant, 8th Ed., Sec. 707.

Moreover, the title to the 30 feet leased by the Canal Commissioners will vest at once in the Development Company by operation of law. This position is fully sustained in Re Corrigan v. Chicago, 144 Illinois, 546, where the Supreme Court of Illinois says:

"Barclay v. Pickels, 38 Mo., 142, was an action by the "lessor to recover rent reserved in a written lease The de- "fendant offered to prove, that after the making of the lease, "and before the rent sued for occurred, the City of St. Louis "had, on a proceeding instituted in the opening of Choteau "avenue, in said city, etc., taken the leased property for the "opening of said street, and that the title to the property "had therefore become vested in the city, etc., which was re- "jected. The Court held the testimony admissable and say: " 'As a general rule, whenever the estate which the lessor " 'had at the time of making the lease is defeated or deter- " 'mined, the lease is extinguishable with it. If, therefore, a " 'lot of land, or other premises, under lease, is required to " 'be taken for city, or other public improvements, the lease, " 'upon confirmation of the report of the commissioners con- " 'demning the property, becomes void. When the lessor " 'ceases to have any interest in the property the rent be- " 'comes annihilated.' Citing Taylor's Landlord and Ten- "ant, Sec. 519. See S. & D. Ry. Co. v. Schmede, supra; "Carthburt v. Keehn, 3 Whart., 357.

"In these cases, the discharge of the lessee from liabil- "ity is placed upon the ground that the landlord's title is ab-

"solutely extinguished in the leased property, and he can "not, therefore, enforce the contract for the payment of rent "after its extinguishment. 'The tenant's covenant is only "'to pay a certain sum as rent,' says Gray, C. J., in Samp-"son v. Clarkson, 113 Mass., 348; and, in the words of Dod-"ridge, in 3 Bulst., 274, 'if it be so that the estate is ended, "'the contract for the rent will end also, this being but *quid* "'*pro, quo, sic*, the rent of the land.' The doctrine is well "established, that although the lessee can not show that his "lessor had no title to the premises when the tenancy began, "he may show that he had a limited estate only, which was "determined by its own limitations before the cause of ac-"tion accrued, as where he held the estate for the life of an-"other, or the like, which expired during the term (Samp-"son v. Clarkson, supra; Wells v. Mason, 4 Scam., 84; St. "John v. Quitzow, 72 Ill., 334); or that he had sold and con-"veyed the land, or ***has been evicted by title paramount***, or "that his title has been sold under execution and conveyed "Franklin v. Palmer, 50 Ill., 202; Supervisors v. Herrington, "id 232; Tilghman v. Little, 13 id. 239; Taylor's Landlord "and Tenant (8th Ed.), Sec. 708, and Notes.

"This rule applies whether the action be for recovery of "the premises, or for rent accrued after the extinguishment "of the landlord's title (Taylor's Landlord and Tenant, Sec. "627-708, and cases cited); and whether the estoppel sought "to be set up arises in pias, or by deed."

It necessarily follows from these decisions, that the title of the State to the entire 73 feet of land, will be as effectually wiped out by the dismissal of this suit as it could be by the affirmance of the judgment of the Supreme Court of Illinois.

II.

HAS THE JUDGMENT OF THE CIRCUIT COURTS AGAINST PLAINTIFFS IN ERROR BEEN SATISFIED BY PAYMENT?

It would be difficult to imagine two propositions more inconsistent than those now before the Court. There would be nothing unusual in the settlement of a suit, by plaintiff surrendering the land in dispute to the defendant, or the defendant paying the judgment and surrendering the land to the plaintiff, but to have both of these contradictory facts set up and relied upon at the same time as is here done, ought to be proof conclusive in the absence of all else, that the motion to dismiss is not made in the utmost good faith. Counsel may well be excused for ignoring this point in his brief.

To substantiate their claim of payment of the judgment, defendants file the affidavit of Robert Carr, who swears, that on January 25, 1901, "*he* paid into and deposited with the Clerk of the Circuit Court the full amount of the judgment, interest and costs awarded to the plaintiffs" (defendants in error). The affidavit is sworn to before William H. Beebe, before whom Carr made an affidavit on January 23. It does not appear from this affidavit for whom Carr claimed to be acting. It would be quite reasonable, however, to suppose that he was still in the employment of the *defendants in error* or the Sanitary District of Chicago, for whom he was acting only two days previous, as appears from his own affidavit of January 23. If he had been acting for the plaintiffs in error or the Canal Commissioners he would surely have so stated in his affidavit, and as it seems quite unlikely that defendants in error should employ a stranger to pay a

judgment in their favor, we must conclude that he was acting (if at all) for the Sanitary District of Chicago.

The Canal Commissioners who have entire charge of the canal funds of, and who prosecute this suit for, the State, and plaintiffs in error, all swear that they have never paid or authorized any one to pay this judgment for them, and that its pretended payment is a fraud on the rights of the State of Illinois. There can be no doubt of this, when the facts, as they appear from the record, are considered.

Harry Witty, Deputy Clerk of the Circuit Court of La-Salle County, swears that the amount of the judgment and costs was paid to the Circuit Clerk by WILLIAM H. BEEBE AND NOT BY ROBERT CARR, and that the following endorsement was made upon the judgment docket: "January 25, 1901, Received of W. H. BEEBE, AGENT, the sum of $64.40, being in full of judgment, interest and costs, Henry Phillips Clerk." By the affidavit of W. H. Keating, an employe of the Sanitary District of Chicago, it appears that Beebe has been for years, and was on the 23rd and 25th of January, an employe in the law department of said Sanitary District.

It therefore appears that the amount of the judgment was not deposited with the Clerk by Robert Carr as he swears, but was deposited by William H. Beebe, the notary public who administered the oath to Carr that he (Carr) made the deposit. It is also clear that the deposit was made for the Sanitary District of Chicago, an entire stranger to the record, and was not made by plaintiffs in error, the Canal Commissioners, or any one authorized by them. It would be hard to conceive of a more flagrant case of fraud, as it is defined in Am. and Eng. Ency. of Law, Vol. 8, 635, "all de-

ceitful practices in depriving or endeavoring to deprive another of his known right, by means of some artful device or plan, contrary to the plain rules of common honesty, is fraud."

Moreover, it has been held by the Supreme Court of Illinois in Seymour v. Haines, 104 Ill., 562, that a judgment can not be satisfied by payment to the Clerk. In that case the Court, passing on that question, says: "Appellee contends "that payment to the Clerk was a satisfaction of this judg- "ment. To this we can not assent. At common law the "Clerk is not a collecting officer, nor has he been made such "by statutory enactment. The sheriff is, and a judgment "may be paid to him when he holds a *fi. fa.* and payment to "the sheriff will operate as a satisfaction, and in such case he "returns the writ indorsed satisfied, and the filing of the "writ becomes evidence of record of the satisfaction of the "judgment; or a judgment may be satisfied by payment to "the plaintiff or to his attorney of record, and the Clerk, on "the presentation to him of the satisfaction price, or a prop- "er receipt in full, is authorized to enter satisfaction in the "judgment docket. But we find no authority at common "law to support the position that payment to the Clerk op- "erated as satisfaction of the judgment. Nor is anything "found in our statute authorizing the Clerk of the Circuit "Court to receive money in satisfaction of a judgment. The "Clerk not being a collecting officer, the payment of the "money to him did not operate to satisfy the judgment, and "his entry of satisfaction on the judgment docket was un- "authorized and void."

It would be superfluous to comment on this transaction. The facts stand out like the handwriting on the wall,

and speak for themselves. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the *purpose* of extinguishing the debt. Here every element of fact and intention necessary to constitute a payment are absent. Instead we have only a deliberate fraud. It would be as sensible to contend that a counterfeit or forgery is genuine, because cleverly executed, as to argue that this is a payment and satisfaction.

III

THAT THIS WRIT OF ERROR IS BEING PROSECUTED FOR THE PURPOSE OF OBTAINING THE OPINION OF THE COURT UPON A QUESTION OF LAW, IN WHICH PROPERTY TO A LARGE AMOUNT IS INVOLVED, AND IN WHICH THE CANAL COMMISSIONERS HAVE AN INTEREST OPPOSED TO THAT OF OTHERS NOT PARTIES TO THE SUIT, WHO HAD NO KNOWLEDGE OF IT, AND NO OPPORTUNITY OF BEING HEARD IN DEFENSE OF THEIR RIGHTS.

In the case of Little v Bowers, 134 U. S., 547, and other cases cited by opposing counsel, this Court has announced this doctrine, "THAT WHERE THERE IS NO ACTUAL CONTROVERSY BETWEEN THE PARTIES, a case will be dismissed, where it appears that the suit was instituted to procure the opinion of the Court on a question of law in the decision of which the parties had a common interest, opposed to that of others, who were not parties of the suit." We can find no decision, and counsel has cited none, where a case has been dismissed, if there was an actual controversy between the parties, even if the case did involve the decision of a question of law in which others might be interested. If this was to be the doctrine of the Courts, then in every case involving the construction of land grants, every person whose title might be affected by the decision, would be a necessary party whether interested in the particular land in suit or not. The case of Railroad Co. v. Baldwin, 103 U. S., 426, is directly in point. That was an action by Baldwin to recover damages for entering upon and appropriating a strip of land two hundred feet in width and two hundred rods in length (about the amount of land in dispute in this case). The question involved the construction of a congressional land grant. It does not appear from the record that a mo-

tion to dismiss was made, on the ground that others should have been made parties. This Court did not hesitate, however, to construe the grant under which the Railroad claimed title, though it must have been apparent to the Court, that the decision would necessarily affect the title to many thousand acres of land, the grant extending entirely across the State of Kansas.

The decisions cited by counsel can, in no event, have any bearing on this case, for the reason that it is clear from the record, that there was from the beginning, and is now, an actual controversy between the parties over the title to the land described in the record, and that no one else claims title or interest therein. Defendants in error are in no position now to ask dismissal of this suit on the ground of a want of proper parties. It must be remembered that defendants in error were plaintiffs in the lower Court. If necessary parties were omitted it was their fault entirely. They certainly should not be permitted to have this appeal dismissed on their motion, after forcing the State to defend, through three Courts, what the officers of the State believe to be its property interests.

Defendants in error have filed the affidavit of Isham Randolph, Chief Engineer of the Sanitary District of Chicago, in support of their motion. It is more remarkable for what is omitted than for what it contains, and seems to have been artfully prepared for the sole purpose of confusing and deceiving the Court. In it he is made to swear (p. 5) "that if it shall be held that the State of Illinois was not authorized to sell any lands within ninety feet of the said canal * * * that the results of such decision will seriously affect property along the line of said canal from the City of Peru to the

mouth of the south branch of the Chicago River, worth a great many million dollars." As this case will probably be taken on final argument before the decision of this motion, the Court will have learned from the record, that the only question for decision is whether the State of Illinois took title to the land in dispute, under certain congressional grants, and that the right of the State of Illinois to dispose of the 90-foot strip or the canal itself is in no way involved. If the right of the State to sell were involved, however, that has been settled in the affirmative in the case of Walsh v. Columbus, Hocking Valley and A. R. R. Co., decided in this Court February 26, 1900 (Opinions of the U. S. Sup. Court, Vol. 9, p. 393). That was a land grant to the State of Ohio to aid in the construction of a canal. That grant, like those before the Court to the State of Illinois, provided that "the canals should be, and forever remain, public highways for the use of the government." Plaintiff sought to prevent the leasing of the canal to a railroad company. This Court held that the State could abandon the canal and lease it for other purposes. The Court also held that the government only, and not the plaintiff, could take advantage of the default of the State, if there had been a breach of contract. Under this decision the State has the right to sell any of its canal lands. Randolph very carefully neglects to testify to a single instance where other property will be affected by a decision of this case. His affidavit is a mere *Innuendo* without a single positive allegation of fact.

Randolph says (p. 7) that the Sanitary District of Chicago has a large tract of land along the east bank of the canal through Joliet, absolutely necessary for it to possess, in order to take advantage of the water-power situation at that

point; "that if the said Sanitary District of Chicago is deprived of all the land by it owned and possessed within 90 feet of the east bank of the Illinois and Michigan Canal, all the power so created by its said works in the City of Joliet will be lost to it." It is only fair to suppose that the able attorneys representing the Sanitary District drew this affidavit as strong as the facts would warrant. No one should know better than they and Chief Engineer Randolph the source of their title to this land. Nothing would be easier than to have so stated, if such were the fact, that the title to this land came to the Sanitary District through the State of Illinois, and that it was a part of the canal grant to the State. The affidavit contains nothing of the sort. It does not even say that the decision in this case will in any way affect the title, or enable the State to deprive the Sanitary District of this land. The Canal Commissioners, on the other hand, testify positively that "the land mentioned by Randolph as being necessary to the development of water power at Joliet by said Sanitary District, lies wholly within section sixteen (16) granted to the State of Illinois by an act of Congress, April 18, 1818, and was never a part of the canal lands of said State."

We believe that a careful consideration of the affidavits on file will convince the Court that this motion to dismiss is a deliberate attempt to defraud the State, and should be denied.

Respectfully submitted,

HOWARD M. SNAPP,

Attorney for Plaintiffs in Error.

No. 168.

Brief of Snapp for P. & C.

Office Supreme Court U. S.
FILED
MAR 8 1901
JAMES H. McKENNEY,
Clerk.

Filed Mar. 8, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 168.

F. X. WERLING ET AL., PLAINTIFFS IN ERROR,

vs.

EMILY E. INGERSOLL ET AL.

OPINION OF THE SUPREME COURT OF ILLINOIS IN CASE OF CITY OF CHICAGO vs. MARY McGRAW, 75 ILL., 566.

HOWARD M. SNAPP,
Counsel for Plaintiffs in Error.

(17,586.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-8-'01

THE CITY OF CHICAGO

vs.

MARY McGRAW.

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1. Party plaintiff at law—*When the wife may sue alone for injury to real estate.*—Where a husband, being the owner of real estate, together with his wife, in 1859, conveyed the same to a son who, in 1863, conveyed the same to the wife, who was his mother, and she afterward controlled the same in her own right, it was *held* that the wife could maintain an action in her own name, for an injury to the property, without joining her husband in the action as a plaintiff.

2. Married woman—*What regarded as her separate property under act of 1861.*—Where a husband and wife conveyed land of the former to their son, and he conveyed the same back to the wife, it was *held* that the wife acquired the title from a person other than her husband, and that the good faith of the transaction could only be questioned by creditors of the husband. A trespasser cannot question the wife's right to the land as her separate property, in an action by her against him.

3. Municipal corporation—*When liable for trespass.*—Trespass lies against a municipal corporation in a proper case; but to render it liable in any case for torts committed

by persons claiming to act for it or by its authority it must appear they were expressly authorized to do the act by the municipal government, or that they were done *bona fide*, in pursuance of a general authority to act for the municipality on the subject to which they relate, or that in either case the act was adopted and ratified by the corporation.

4. Where the city of Chicago was sued in trespass for an injury to a lot of the plaintiff caused by widening and deepening a canal, which the city was empowered to do, but no ordinance of the city was introduced showing that the city had undertaken to exercise the power, and the written contract of the parties doing the work which caused the injury was not produced on the trial, and there was no proof that the city directed the work or adopted and ratified it afterward, it was *held* that a recovery against the city could not be sustained for want of sufficient proof that the trespasses were committed under the direction or by the authority of the city.

5. Same—*Whether city of Chicago, in exercising power of widening and deepening canal, was agent of the State.*—Under the act of February 16, 1865, authorizing the city of Chicago to widen and deepen the Illinois and Michigan canal, for the purpose of cleansing the Chicago river, in exercising the powers conferred, the city is not to be regarded as the agent of the State, and, therefore, not liable for an injury caused to private property.

6. Trespass—*When title to real estate need not be proved.*—In trespass to real estate in the actual possession of the plaintiff, where no effort is made by the defence to show title in any one else, proof of title other than of possession is not necessary.

7. Same—*Title deed admissible in evidence to show the right claimed by possession.*—In trespass to real estate, the deed to the plaintiff is competent evidence, as tending to prove title in plaintiff, and show what right he claims by his possession of the property.

8. Parol evidence—*To show what lands were reserved from sale by the United States.*—Parol evidence is not competent to show that no sales were made by the Government within a reservation claimed to have been made for a certain purpose, as the Government records furnish the proper and best evidence of what lands were sold and what reserved.

9. Reservation of land for canal—*Party claiming must show performance of conditions imposed.*—Where it is sought to defeat the right of a party in possession of land, claiming to own the same under the act of Congress of March 30, 1822, giving and reserving the same to the State of Illinois for canal purposes, it must be shown that the conditions upon which the grant depended were complied with.

Appeal from the Circuit Court of Cook County, the Hon. Lambert Tree, Judge, Presiding.

Mr. T. Lyle Dickey, for the appellant.
Messrs. Hoyne, Horton & Hoyne, for the appellee.

Mr. Justice SCHOLFIELD delivered the opinion of the court:

This was trespass by the plaintiff in the court below, and now appellee, against the defendant in that court, and now appellant, for injuries done to her property under the direction of the defendant in excavating, widening, and deepening the Illinois and Michigan canal at Canal Port, in Cook county. There was evidence on the trial that the title to the property claimed to have been injured was originally in the name of the plaintiff's husband, John McGraw; that he and she joined in a deed and conveyed it to their son, Peter J. McGraw, on the 18th of April, 1859, and Peter J. McGraw afterward, and on the 31st day of March, 1863, reconveyed the property to the plaintiff. The plaintiff's husband, at the time the alleged injuries were committed and at the time of the trial, was still alive, residing with her, and their marital relations had never been dissolved. It is insisted that he was, therefore, a necessary party to the suit; that the plaintiff did not acquire the property in good faith from a person other than her husband, and consequently cannot claim it as her sole and separate property under the act of February 21, 1861, relating to the separate property of married women.

The deed from the plaintiff's husband and herself to their son, Peter J., on the 18th of April, 1859, conveyed whatever title her husband then had in the property to Peter J., and his deed to the plaintiff on the 31st day of April, 1863, invested her with that title. Whether the controlling motive in these transactions was to defraud creditors of the plaintiff's husband, or to place the title, by what was supposed to be the necessary legal steps, in the plaintiff, it would seem to be quite certain that he retained no interest, either legal or equitable, in the property. He could not be heard either in a court of law or equity, should he seek to reinvest himself with the title, for the reason that he had parted with it, for either of these purposes. The plaintiff acquired her title, in the language of the statute, from a person

other than her husband, and that she did so in good faith can be questioned alone by those who have a right to object to her holding the title. These, it is believed, are limited to her husband's creditors. Certainly he has no right to object, and those who have injured the property cannot, therefore, be held responsible to him as for an injury done to his property, and we can conceive of no other grounds upon which they can question the plaintiff's right.

The evidence is full to the point that the plaintiff has controlled and managed the property, as her sole and separate property, free from the control of her husband. The evidence does not show a joint use or possession by the plaintiff and her husband, but it is clearly shown that the business connected with the use of the property was exclusively managed by her, in her own name, and that her husband did nothing whatever, but simply lived with her as a mere pensioner on her bounty. The property being, then, as against wrong-doers, the sole and separate property of the plaintiff, acquired from a person other than her husband, in good faith, and being under her sole and separate control, the suit was well brought in her name alone. *Beach vs. Miller*, 56 Ill., 206.

The next inquiry is, does the evidence sufficiently show that the alleged trespasses were committed under the direction or by the authority of the city.

Fox, Howard & Walker were sued jointly with the city, but after hearing evidence, and before the case was finally given to the jury, on motion of appellee's counsel, the case was dismissed as to them. Before this was done, Howard was sworn and examined as a witness in his own behalf, and testified that the work on the canal, resulting in the injuries complained of, was done by his firm under a contract with the city, and pursuant to the terms of that contract. The contract itself, however, was not offered in evidence, and what its terms were we cannot know. No ordinance of the city relating to the work was given in evidence; on the

contrary, when it was offered to read such ordinance as evidence on behalf of the city, they were, on motion of appellee's counsel, excluded by the court. There seems to have been a zealous effort, indeed, on behalf of appellee, to exclude all evidence showing the connection of the city with the improvement of the canal.

That an action of trespass lies, in a proper case, against a municipal corporation, is not an open question in this court (*Allen vs. The City of Decatur*, 23 Ill., 334; *Wolf et al. vs. Boettcher*, 64 *ib.*, 316). But to render it liable, in any case, for torts committed by persons claiming to act for it, or by its authority, it must appear that they were expressly authorized to do the acts by the municipal government, or that they were done *bona fide* in pursuance of a general authority to act for the municipality on the subject to which they relate, or that, in either case, the act was adopted and ratified by the corporation (*Thayer vs. Boston*, 19 Metc., 571; see, also, Dillon on Municipal Corporations, § 772, and note).

Assuming, as we shall, that appellant was authorized by the legislature to "widen and deepen" the Illinois and Michigan canal for its own benefit, we cannot judicially know that it determined to do so, however well known the fact may have been to its citizens, nor can we take cognizance, without proof, of what ordinances and contracts it may have adopted and made on that subject, nor can we, in the absence of proof, know that its agents or employés acted within the scope of their duties. Counsel for appellee refer to and quote from what they claim to be an ordinance of appellant approving certain acts relative to this work, but no such ordinance is in evidence.

We are, therefore, of opinion that the evidence fails to sufficiently connect appellant with the acts complained of.

The objection that under the act of February 16, 1865, the work of "widening and deepening the canal" was not within the corporate duties of appellant we should not regard as tenable if the evidence had sufficiently shown that the work

was in fact done by appellant pursuant to the provisions of that act. The question was before the court and decided in *The City of Chicago vs. Joney*, 60 Ill., 384, where the evidence was complete and clearly showed the connection of the city with the injuries complained of. It was there said: "The facts stated in the preamble to the act of 1865 show conclusively that this enlargement of the canal was a suggestion of the city of Chicago and recommended for the only purpose of cleansing the river, which had become, by reason of having no current, a nuisance. The act of 1865 bears on its face the impress of benefit to Chicago, and nothing more. That was the moving cause, as we infer, for the passage of the act. The city was, in no sense, the agent of the State."

It is further insisted that the court erred in admitting in evidence certain deeds, among others those of John McGraw and the plaintiff to Peter J. McGraw and Peter J. McGraw to the plaintiff, because a complete chain of title from the Government was not first shown. These deeds were competent evidence as tending to prove title in the plaintiff and to show what right she claimed by her possession. The rule is that the person who has the actual possession of real estate will be deemed and held to be the true owner until the contrary is made to appear (*McLean vs. Forden et al.*, 61 Ill., 109). No effort was made to show title to the property conveyed by these deeds in any one else, and they were sufficient *prima facie* evidence of title in the plaintiff.

Appellant offered to prove by parol that no sales were made by the Government of the United States within a reservation claimed to have been made for the benefit of the canal. This evidence was properly excluded. The Government records furnish the proper evidence of what lands were sold and what reservations were made for canal or other purposes. If a reservation by the Government had been proved, embracing the plaintiff's property, the burden would then have been on her to have shown that the Government had subsequently, and before its control over the

reservation had ceased, changed its policy and disposed of the property reserved by sale.

Objection is urged to the ruling of the court in refusing to give certain instructions asked by the defendant. Four of these relate to the question discussed in the first part of this opinion, with reference to the plaintiff's rights under the act of 1861 respecting the separate property of married women, and were properly refused, in view of her rights there expressed. The remaining one was objectionable, in view of the law as held by this court in *The City of Chicago vs. Joney, supra.*

It is finally insisted that a strip of land 90 feet wide, on each side of the line of the canal, was dedicated by the United States, before any of the lands were put in market for sale, to the use of the State for transacting the canal business; that this dedication was accepted by the State, and that the proof shows that it was taken possession of by the State, and that the plaintiff's property is within this strip of 90 feet. To support this, the counsel for the defendant refer to the act of Congress of March 30, 1822. So much of that act as is supposed to bear upon the question is as follows: "That the State of Illinois be and is hereby authorized to survey and work through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; and 90 feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in cases hereinafter provided for, and the use thereof forever shall be and the same is hereby vested in said State for a canal, and for no other purpose whatever; on condition, however, that if said State does not survey and direct, by law, said canal to be opened, and return a complete map thereof to the Treasury Department, within three years from and after the passing of this act; or, if the said canal be not completed, suitably for navigation, within twelve years thereafter; or if said ground shall ever cease to be occupied by and used for a canal suit-

able for navigation, the reservation and grant hereby made shall be void and of none effect," etc.

There is no evidence whatever in the record before us that these conditions were complied with by the State, and it is incumbent on the defendant, in order to avail of the reservation and grant as against the possession of the plaintiff, to show that the conditions were complied with, because this is made indispensable by the act of Congress to the vesting of the rights conferred in the State. On the contrary, the General Assembly, at its session in 1826, memorialized Congress for a grant of lands to aid in the construction of a canal, not, however, connecting the Illinois river with the *southern bend of Lake Michigan*, as required by this act of Congress, but uniting the waters of Lake Michigan with the Illinois river. And Congress, by another act approved March 2, 1827, granted to the State, for the purpose of aiding it in opening a canal, "to unite the waters of the Illinois river with those of Lake Michigan, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office," etc.

Subsequently the General Assembly, by an act approved January 22, 1829, created "the board of commissioners of the Illinois and Michigan canal" and invested it with power to consider, devise, and adopt such measures as might be required to facilitate and effect the communication, by means of a canal and locks, between the navigable waters of Illinois river and Lake Michigan; and among other duties enjoined on it was that of selecting or causing to be selected, as soon as practicable, in conjunction with such commissioner as should be appointed by the Commissioner of the General Land Office under the direction of the President of the United States, the alternate sections of land granted to the State by the act of Congress last referred to, and it is not claimed or pretended that the Illinois and Michigan canal, as located

and constructed by this board and its successor, has for one of its termini the southern bend of Lake Michigan.

The act of Congress of March 2, 1827, does not purport to be an amendment of the act of March 30, 1822, nor does it, even by inference, refer to it. In our opinion, these acts constitute distinct and independent offers by the Government of the United States of aid to the State in the construction of canals, and the latter one having been accepted, without reference to the terms and conditions of the former, the State is only entitled to the grant which it conveys.

For the error indicated, however, the judgment must be reversed and the cause remanded.

Judgment reversed.